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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1995

VALMET OY

Petitioner,

v.

LYNDA ALDY, JANET WALKER,
MARY ANN BUGGS MALONE, MIA MALONE,
KEITH MALONE AND MARCUS MALONE

Respondents.

- and -

VALMET PAPER MACHINERY, INC.

Petitioner,

v.

KENNETH AND ELMIRA BROWN, ET AL.

Respondents.

On Petition for a Writ of Certiorari to
the United States
Court of Appeals for the Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

Michael Evan Jaffe*
David L. Kelleher
ARENT FOX KINTNER
PLOTKIN & KAHN
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036-5339
(202) 857-6000
Counsel for Petitioners

Michael B. Wallace
PHELPS DUNBAR
200 S. Lamar Street
P.O. Box 23066
Jackson, MS 39225
(601) 352-2300

*Counsel of Record

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QUESTIONS PRESENTED

1. Whether in an action against a foreign state a plaintiff must plead and prove specific facts establishing the applicability of one of the exceptions to the Foreign Sovereign Immunities Act as a prerequisite to jurisdiction under 28 U.S.C. § 1330(a) (1993).

2. Whether an alleged failure by a foreign state to warn of a defect in a product constitutes "an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere [which] causes a direct effect in the United States," within the meaning of 28 U.S.C. § 1605(a)(2).

RULE 29.6 STATEMENT

This petition is filed on behalf of Valmet Oy [Corporation] and Valmet Paper Machinery, Inc. Valmet Corporation has no parent company.

Valmet Paper Machinery Inc. was, up to August 31, 1995, a wholly-owned subsidiary of Valmet Corporation, when it was merged into Valmet Corporation. A majority of the outstanding shares of Valmet Corporation are owned by the Republic of Finland. As of May 1, 1996, majority interests in the following entities also were owned by Valmet Corporation or its subsidiaries:

Valmet-Boustead Pty. Ltd.
Valmet Paper Machinery (ANZ) Pty. Ltd.
Valmet Paper Machinery Holdings Inc.
    Valmet Canada Inc.
Jylhäraisio Oy
    Jylhäraisio GmbH
    Jylhäraisio Inc.
Royal S.A.R.L.
Valmet Paper Machinery France S.a.r.l.
Valmet Papiermaschinen GmbH
    Valmet Papiermaschinen Service GmbH
    Valmet Papiermaschinen Vertriebs GmbH
    Valmet Papiermaschinen Ges.m.b.H.
Valmet Paper Machinery (Asia) Ltd.
Valmac Italia S.r.l.

Rotomec-Costruzioni Meccaniche Elettriche S.p.a.

O.M.E.A. S.r.l.

Rotomec Frabelux S.A.R.L.

Rotomec Service GmbH

Rotomec Iberica S.A.

Rotomec America Inc.

Valmet-Gorizia S.p.a.

Valmet Japan Co., Ltd.

Valmet Pappersmaskiner Skandinavien AB

Valmet Paper Machinery (UK) Ltd.

Oulun Kumitehdas Oy

Oulun Norrcon Oy

Comroll Oy

Uhab AB

Valmet-Karhula Inc.

Valmet-Carcano S.p.A.

Valmet-Singapore Pte. Ltd.

Valmet Automation Inc.

Valmet Automation Ges.m.b.H.

Valmet Automation (Canada) Ltd.

Valmet Automation (Australasia) Pty. Ltd.

CPS Electroniikka Inc.

Kajaani Electronics Ltd.

Sensodec Oy

Valmet Automation Projects Ltd.

Valmet Fisher-Rosemount Inc.

Valmet Automation France S.A.

Valmet Automation GmbH

Valmet Automation K.K
Valmet Automation B.V.
Valmet Automation (UK) Ltd.

Oy Saab-Valmet Ab

Valmet Aviation Industries Inc.
Valmet Avicomp Oy
Valmet Power Transmission Inc.

Statement Insurance Company Limited

Valfin Ltd.
Valmet (SEA) Pte. Ltd.

Valmet Svenska AB
Umeá Logging and Industrial Machines AB
Valmet Automation (Sverige) AB
Valmet-Karlstad AB
Tampella Pappersmaskiner AB

Valmet NV Inc.
Valmet, Inc.
Honeycomb Systems S.a.r.l.
Valmet Automation (USA) Inc.
Sandy Hill International Inc.
Valmet-Sandy Hill Services Inc.
Valtra Inc.
Sesodec Inc.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit in *Aldy v. Valmet Oy* is reported at 74 F.3d 72

(5th Cir. 1996). (App. 4a-12a). The opinion of the United States Court of Appeals for the Fifth Circuit in *Brown v. Valmet-Appleton, Inc.* is reported at 77 F.3d 860 (5th Cir. 1996). (App. 13a-18a). The opinions of the United States District Court for the Western District of Louisiana (App. 19a-47a) and United States District Court for the Southern District of Mississippi (App. 48a-52a) are not reported.

JURISDICTION

The United States Court of Appeals for the Fifth Circuit entered its judgment in *Aldy* on January 22, 1996. A petition for rehearing and suggestion for rehearing en banc were denied on March 6, 1996. (App. 1a-3a). The Fifth Circuit entered judgment in *Brown* on March 18, 1996. The jurisdiction of the Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Jurisdiction over foreign states is governed by 28 U.S.C. § 1330(a), which provides that: "[t]he district courts shall have original jurisdiction without regard to amount in controversy of any nonjury civil action against a foreign state as defined in section 1603(a) of this title as to any claim for relief in personam with respect to which the foreign state is not entitled to immunity either under sections 1605-1607 of this title or under any applicable international agreement."

Section 1604 of the Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1604 (1995), provides that: "[S]ubject to

existing international agreements to which the United States is a party at the time of the enactment of this Act a foreign state shall be immune from the jurisdiction of the courts of the United States except as provided in sections 1605 to 1607 of this Chapter."

Section 1605(a)(2) of the Foreign Sovereign Immunities Act provides, in pertinent part: "A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case . . . in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States."

STATEMENT

A. Basis for Federal Jurisdiction

The *Brown* case was originally filed in District Court alleging jurisdiction pursuant to 28 U.S.C. § 1332; jurisdiction in fact is based upon 28 U.S.C. § 1330. The *Aldy* case was originally filed in state court and removed to District Court pursuant to 28 U.S.C. § 1441(d).

B. The Proceedings Below

1. Brown v. Valmet-Appleton, Inc. ("*Brown*")

Plaintiffs commenced this action against six defendants, including Valmet Paper Machinery, Inc. ("VPI"), alleging injuries arising from an industrial accident at International Paper Company, Moss Point, Mississippi. The complaint, which identified two known and four unknown defendants, sought to recover for negligent design and manufacture, failure to warn, failure to test, failure to inspect, failure to safeguard and placement of a defective product into the stream of commerce. The complaint lumped together all six defendants, asserting all allegations of fact and liability against the six defendants collectively.[1/] The complaint, therefore, alleged no specific fact and no specific injury-causing conduct by VPI, or any other individual defendant.

VPI moved to dismiss the generalized claims in the complaint based on its immunity under the Foreign Sovereign Immunities Act ("FSIA"), and because nothing alleged in the complaint sought to or permitted the exercise of jurisdiction over VPI under the FSIA--the exclusive basis for jurisdiction over foreign states. While VPI's motion was pending, the District Court permitted plaintiffs to amend their complaint to add two additional defendants. In all other respects, the complaint and amended complaint were identical. The amended complaint, like the initial complaint,

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[1/] The Fifth Circuit labeled this practice "*in globo*" allegations. 77 F.3d at 863 n.10.

lumped together all defendants and alleged all facts and claims against a collective group of entities referred to only as "Defendants." VPI moved to dismiss the generalized claims in the amended complaint on the same grounds that VPI moved to dismiss the initial complaint.

On October 17, 1994, the District Court entered a Memorandum Opinion and Order denying VPI's motion to dismiss. The District Court conceded that the allegations of the amended complaint were "somewhat generic," but concluded that the factual findings regarding subject matter jurisdiction "appear to be intertwined with the merits," and therefore dismissal would be "premature." (App. 50a).

On appeal, VPI urged the Fifth Circuit to compel plaintiffs, as a prerequisite to establishing subject matter jurisdiction over VPI, to identify the specific facts upon which their claims against VPI were based -- as opposed to the facts underlying plaintiffs' claims against the non-immune defendants. VPI further urged the Fifth Circuit to reject the use of *in globo* allegations as a mechanism for defeating sovereign immunity, as *in globo* allegations actually conceal the facts needed to conduct the jurisdictional analysis imposed by Congress in the FSIA.

The Fifth Circuit, however, disregarded settled precedent and, in direct conflict with the decisions of the Ninth Circuit, eliminated the requirement that as a prerequisite to jurisdiction under the FSIA the plaintiffs set forth a clear statement of the claims against the sovereign entity. In direct conflict with the decisions of several circuits, the Fifth

Circuit further refused to require plaintiffs to plead a direct nexus between their claims and specific commercial activity of VPI. Instead, the Fifth Circuit held that *in globo* pleadings are sufficient to defeat sovereign immunity, (App. 17a n.10), and allegations that a foreign state is merely "involved" in the manufacture and distribution of a product is sufficient to defeat immunity. (App. 17a).

The Fifth Circuit also declined to apply the heightened pleading requirement necessary to establish jurisdiction in other immunity cases. (App. 17a n.11). Indeed, the Fifth Circuit relied on the wrong rule when it approved the vague and generalized allegations of plaintiffs' claims, citing Rule 8(e)(2), Fed. R. Civ. P., for the proposition that *in globo* allegations are sufficiently specific; however, the issue involved in this action is jurisdiction, not whether plaintiffs sufficiently state a claim outside the FSIA. Finally, as to the remaining FSIA issues raised by VPI in its motion to dismiss, the Court merely adopted the reasoning of the *Aldy* decision issued by a separate Panel of the Fifth Circuit eight weeks earlier, including the holding that jurisdiction may be based on a failure to act, instead of an affirmative act.

2. Aldy v. Valmet Oy ("*Aldy*")

Plaintiffs commenced this action against Valmet Oy ("Valmet") by filing a complaint that alleged, in the sparsest terms, that the deaths of Charles Aldy and Charley Malone were the consequences of negligence by Valmet in the manufacture or design of a paper machine. The accident involved a Valmet paper machine designed in the early

1970's in Finland and occurred when the lifting mechanism in the paper machine stopped, leaving the breast roll suspended and held by the safety brake incorporated in the machine by Valmet. Mr. Aldy and Mr. Malone were injured when their co-workers disconnected the safety brake--allowing the roll to fall on Aldy and Malone.

Valmet moved to dismiss the complaint for lack of subject matter jurisdiction under the FSIA. Specifically, Valmet argued that the generalized and conclusory allegations of the complaint were not sufficient to state an exception under the FSIA to Valmet's sovereign immunity. The Magistrate Judge, in an opinion later adopted by the District Court, ruled that the allegations of the complaint did state an exception to sovereign immunity, but invited Valmet to file a summary judgment motion at the close of discovery if plaintiffs had not established the requisite jurisdictional predicate during discovery.

After discovery was complete, Valmet moved for summary judgment on the ground that there was no evidence establishing a predicate for an exception to Valmet's sovereign immunity. Since there was no evidence proving an exception to sovereign immunity, Valmet requested the court to find it had no subject matter jurisdiction. Specifically, Valmet argued that plaintiffs had not proved that any "act" or "commercial activity" by Valmet caused the accident.

The District Court denied Valmet's motion, finding an issue of fact existed as to whether the accident occurred

because of a reasonably anticipated use of the paper machine. Although Valmet's summary judgment motion covered all of the issues described above, the issue of reasonably anticipated use was the only ground addressed in the District Court's opinion.[2/] The District Court refused to address the merits of Valmet's immunity argument, holding that the earlier decision on the issue, made before discovery was conducted and using the standard for resolving motions to dismiss, was now "law of the case."

On appeal, Valmet urged the Fifth Circuit to overturn the decision of the District Court, which refused to re-examine the issues of subject matter jurisdiction and Valmet's immunity defense in light of the fully developed discovery record and Rule 56. The Fifth Circuit merely affirmed the District Court's decision based on the allegations of the complaint, not the discovery record, concluding:

[2/] In its motion, Valmet demonstrated that plaintiffs lacked any evidentiary basis to establish that an act by Valmet could give rise to an actionable wrong. *See America West Airlines, Inc. v. GPA Group, Ltd.*, 877 F.2d 793, 796 (9th Cir. 1989). In particular, Valmet demonstrated that there was no evidentiary basis for finding under the Louisiana Products Liability Act, La. R.S. §§ 9:2800.52-57 (1995)(the "LPLA"), that Valmet was negligent in designing the paper machine (there was no evidence, as required by the LPLA, that an alternative design existed in the early 1970's when the machine was made or that an alternative design was economically feasible), that it failed to provide proper warnings (there was plain evidence that the risk of standing under a suspended load was obvious, relieving Valmet of any duty to warn), that the accident was not the fault of intervening negligence (mill personnel disabled the safety brake that, as designed, was holding the roll) or that the accident occurred during a reasonably anticipated use of the machine. R.1030 *et seq.*

> The plaintiffs maintain that Aldy's and Malone's deaths resulted from either the negligent design or manufacture of the paper machine or both . . . *These allegations are sufficient to confer subject matter jurisdiction* (citation omitted) (emphasis supplied).

(App. 10a-11a).

The Fifth Circuit's ruling not only failed to apply the correct standard in reviewing the denial of Valmet's summary judgment motion, it proceeded to rewrite the FSIA and to expand the jurisdiction of the Federal courts beyond Congress' express limitations. The Fifth Circuit held that to defeat Valmet's sovereign immunity and confer subject matter jurisdiction on the District Court, plaintiffs need only file "classic design and manufacturing defect suits, which the third clause of the commercial activities exception is broad enough to cover." (App. 10a). The Fifth Circuit concluded that the mere sale of a product in the United States, coupled with a conclusory allegation that the product is somehow defective, strips a foreign sovereign of its immunity without regard to Congress' requirements of a jurisdictional nexus.

Further, the Fifth Circuit's ruling creates a conflict between the circuits as to whether the FSIA encompasses failure to warn claims as a basis for subject matter jurisdiction. *In re Air Crash Disaster Near Warsaw, Poland*, 716 F. Supp. 84 (E.D.N.Y. 1989), *rev'd Filus v. Lot Polish Airlines*, 907 F.2d 1328 (2d Cir. 1990), the District Court and the Second Circuit made clear that failure to warn does not constitute an "act performed in the United States in

connection with a commercial activity of the foreign state elsewhere," as required by the FSIA. 716 F. Supp. at 86. In *Aldy*, the Fifth Circuit asserted, without citation or argument, that contrary to the holding in *In re Air Crash Disasters*, "an omission is an act" under the FSIA. (App. 11a). The Fifth Circuit did not discuss the legislative history of the FSIA -- which takes a contrary view of this issue -- or provide any other justification for its conclusion. The Fifth Circuit then distinguished *In re Air Crash Disaster* by writing that since that case was based on the second clause of § 1605(a)(2), its holding would not apply to Aldy, because the *Aldy* case involved the third clause of that section. (App. 12a n.2). Thus, as a result of *Aldy*, a failure to warn claim will constitute subject matter jurisdiction in the district courts of the Fifth Circuit, while such a claim will not constitute subject matter jurisdiction in the district courts of the Second Circuit.

REASONS FOR GRANTING THE PETITION

I. THE FIFTH CIRCUIT DECISIONS ARE CONTRARY TO CONGRESS' MANDATE, CONFLICT WITH DECISIONS OF SEVERAL CIRCUITS AND EVISCERATE FOREIGN SOVEREIGN IMMUNITY

Contrary to the express purpose and intent of Congress when enacting the FSIA, the *Aldy* and *Brown* decisions unilaterally expand the subject matter jurisdiction of the federal courts over foreign states and vest in each District Court the discretion to determine what degree of pleading

specificity is required to defeat sovereign immunity. In 1976, when Congress passed the Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1602-1611 (1995) (the "FSIA" or the "Act"), Congress acted in response to the requests of both the State and Justice Departments for "a uniform statutory explication of the requirements for sovereign immunity," *Stena Rederi AB v. Comision de Contratos*, 923 F.2d 380, 385 (5th Cir. 1991). In so doing, Congress established a "comprehensive framework for determining whether a court in this country, state or federal, may exercise jurisdiction over a foreign state," and expressly provided "[c]laims of foreign states to immunity should henceforth be decided ... in conformity with the principles set for this [Act]." *See* 28 U.S.C. § 1602; *Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607, 610 (1992). Thus, Congress determined that the FSIA "would provide the sole basis for obtaining jurisdiction over a foreign state in the courts of this country . . .." *Argentina Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 443 (1989).

The Act "starts from a premise of immunity and then creates exceptions . . ."*Foreign Sovereign Immunities Act of 1976*, H.R. Rep. No. 1487, 94th Cong., 2d Sess. 1 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6604, 6616 (1976) (hereinafter "1976 U.S.C.C.A.N. at ___"). Unless one of its six narrowly-crafted exceptions applies, a foreign sovereign "*shall* be immune from the jurisdiction of the courts of the United States." 28 U.S.C. § 1604 (emphasis supplied); *Weltover*, 504 U.S. at 617. Because federal courts lack subject matter jurisdiction over foreign states that are immune under the FSIA, 28 U.S.C. § 1330, "at the threshold

of every action in a district courts . . . the court must satisfy itself that one of the exceptions [to FSIA immunities] applies." *Verlinden B. V. v. Central Bank of Nigeria*, 451 U.S. 480, 486 (1983). In so doing, foreign states are presumptively immune from suit, unless and until *evidence* is produced "establishing that the foreign state is not entitled to immunity." *1976 U.S.C.C.A.N.* at 6616.

The legislative history of the Act makes clear that it is a plaintiff's burden to "prove" the existence of an exception to immunity. The House Report sets forth the precise standard to be used in judging whether an exception to immunity has been established:

> Once the foreign state has produced such prima facie evidence of immunity, the burden of going forward would shift to the plaintiff to produce *evidence* establishing that the foreign state is not entitled to immunity.

1976 U.S.C.C.A.N. at 6616 (emphasis added).[3/]

The Ninth Circuit has repeatedly confirmed Congress' mandate and made it clear that plaintiffs must offer "evidence," not mere allegations, to show the applicability of a specific exception to the FSIA. In *Joseph v. Office of the Consulate General*, 830 F.2d 1018, 1021 (9th Cir. 1987),

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[3/] Valmet and VPI each established a prima facie case of immunity by demonstrating to the District Courts that they were the instrumentalities of a foreign state. Thus, the burden shifted to plaintiffs to prove jurisdiction, not merely allege it--and in neither case did plaintiffs meet this burden.

cert. denied, 485 U.S. 905 (1988), for example, the Ninth Circuit explained that only after "plaintiff offers *evidence* that an FSIA exception to immunity applies, [does] the party claiming immunity bear the burden of proving by a preponderance of the evidence that the exception does not apply." (emphasis added). *See also DeBlake v. Republic of Argentina*, 965 F.2d 699, 708 (9th Cir. 1992) ("[t]he plaintiff then has the burden of going forward with the *evidence* by offering proof that one of the FSIA exemptions applies") (emphasis added), *cert. denied*, 507 U.S. 1017 (1993); *Schoenberg v. Exportadora del Sal, S.A.*, 930 F.2d 777, 779 (9th Cir. 1991) ("[o]nce the plaintiff offers *evidence* that an FSIA exception to immunity applies, the party claiming immunity bears the burden . . . .") (emphasis added), *cert. denied*, 115 S. Ct. 581 (1994); *Meadows v. Dominican Republic*, 817 F.2d 517, 522-23 (9th Cir) (same rule), *cert. denied*, 484 U.S. 976 (1987).

Further, the Ninth Circuit has made it clear that when determining whether a specific exception applies, the district court should "focus only on those specific acts that form the basis of the suit." *Joseph v. Office of the Consulate General*, 830 F.2d at 1023. With regard to the commercial activity exception to the FSIA, applicable in both *Aldy* and *Brown*, the courts examine whether the particular conduct giving rise to the claim in question actually constitutes or is in connection with commercial activity, regardless of the defendant's general commercial or governmental character." *Id.* (citations omitted).

The *Aldy* and *Brown* decisions stand in stark contrast to the specificity requirements of the Ninth Circuit and Congress' mandate that foreign states remain immune from suit until evidence is produced proving the applicability of an FSIA exception. If permitted to stand, *Aldy* and *Brown* will return the doctrine of foreign sovereign immunity to the pre-FSIA, case-by-case, court-by-court, standardless determination that the FSIA was designed to eliminate.

A. In *Brown*, the Fifth Circuit Eliminated the Specificity of Pleading Required Both of Claims Under the FSIA and of Allegations Concerning Federal Court Jurisdiction.

Until the Fifth Circuit's ruling in *Brown*, it was well established that it was not the obligation of the foreign state, as the party seeking to preserve its immunity, to establish that none of the exceptions to sovereign immunity apply. *Joseph*, 830 F.2d at 1021; *Meadows*, 817 F.2d at 522-23. Thus, courts previously had demanded, as a prerequisite to the statutory jurisdictional analysis under the FSIA, that the complaint present a clear statement of the plaintiffs' claim against the sovereign entity. *Gerding v. Republic of France*, 943 F.2d 521, 525 (4th Cir. 1991), *cert. denied*, 507 U.S. 1017 (1993) (plaintiff must identify materials of record showing that defendant is not entitled to immunity); *Joseph* , 830 F.2d at 1023. *See also McKesson Corp. v. Islamic Republic of Iran*, 138 F.R.D. 1, 2 (D.D.C. 1991) (plaintiff must assert specific facts and may not rely on conclusory allegations to establish jurisdiction under the FSIA).

In *Brown*, the Fifth Circuit abandoned this well settled precedent and eliminated this pleading requirement in its entirety. The *Brown* decision rewrote the FSIA to strip foreign states of immunity in any product liability case where the pleadings alleged claims "involving" the sale of a product in the United States, even when plaintiff makes only the most conclusory of allegations of design or manufacturing defects. (App. 17a). Indeed, in the *Brown* decision, the Fifth Circuit expressly approved "*in globo*" pleading as sufficient to strip a foreign sovereign of the immunity guaranteed by Congress. *In globo* pleading permits plaintiffs to conceal, intentionally or unintentionally, the basis for a claim against a sovereign by adopting *in globo* allegations, i.e. attributing all conduct and all acts alleged in a complaint to multiple defendants without ever specifying which defendant engaged in what conduct. (App. 17a n.10). Thus, plaintiffs now may lump together allegations against manufacturers, suppliers and installers of *different* products and/or services -- as the plaintiffs in the *Brown* case did -- and defeat sovereign immunity *without* ever identifying a *specific injury-causing defect* attributable to the activities of the sovereign.

Specifically, in the *Brown* complaint, notwithstanding the FSIA's requirements for specificity in allegations of jurisdiction, plaintiffs alleged only that "the Defendants were negligent in one or more of the following respects . . .," the "Defendants are strictly liable for...," and the plaintiffs' injuries were caused by "the negligence of Defendants and the defective nature of their paper winder equipment and/or component parts." In short, plaintiffs' complaint made no

attempt to comply with the express mandate of Congress in the FSIA. The District Court conceded that these allegations were "somewhat generic." (App. 51a). The Fifth Circuit, however, labeled the allegations "*in globo*," and incredibly concluded that this did not detract from their specificity. (App. 17a n.10). In fact, however, there is no specificity to these allegations. These "somewhat generic", *"in globo"* pleadings actually conceal plaintiffs' claims against the foreign state.

The Fifth Circuit, in effect, has held that there is no difference between a foreign state and a non-foreign state at the motion to dismiss stage of a case, notwithstanding the jurisdictional limitation of 28 U.S.C. § 1330(a) and Congress' enactment of the FSIA. This unprecedented, expansive reading of the exceptions to immunity and the Court's failure to look at the specific allegations, or lack of allegations, against each defendant named in a complaint, means that in this case and in all future cases, conclusory allegations are sufficient to defeat immunity--regardless of the actual evidence. There is no doubt that this interpretation recasts the FSIA in a manner inconsistent with precedent and inconsistent with Congress' mandate as reflected by the plain language of the Act.

The *Brown* decision further eliminates the requirement that under the commercial activity exception of the FSIA, plaintiffs establish an identifiable and *direct nexus* between the specific conduct underlying the claim against the sovereign and the sovereign's commercial activity. This principal has been reaffirmed by virtually every circuit that

has addressed the issue. *See Compania Mexicana de Aviacion v. United States District Court*, 859 F.2d 1354, 1360 (9th Cir. 1988) (there must be a significant nexus between the plaintiff's cause of action and the commercial activity of the foreign sovereign); *America West Airlines, Inc. v. GPA Group*, 877 F.2d 793, 796 (9th Cir. 1989) (there must be a nexus between defendant's commercial activity and plaintiff's cause of action); *Zedan v. Kingdom of Saudi Arabia*, 849 F.2d 1511, 1513-14 (D.C. Cir. 1988) (direct causal connection between act of foreign sovereign and plaintiff's cause of action); *Rush-Presbyterian-St. Luke's Medical Center v. Hellenic Republic*, 877 F.2d 574, 581 (7th Cir.), *cert denied*, 493 U.S. 937 (1989) (activity must be substantial, direct, and foreseeable to support jurisdiction under the FSIA); *Gould, Inc. v. Pechiney Ugine Kuhlmann*, 853 F.2d 445, 452-53 (6th Cir. 1988) (there must be a connection between the commercial activity and the act complained of); *Harris Corp. v. Nat'l Iranian Radio & Television*, 691 F.2d 1344, 1351 (11th Cir. 1982) (the cause of action must be a direct, foreseeable consequence of the foreign sovereign's act); *Gerding* at 943 F.2d at 526 (substantial contact and nexus requirement must be met to satisfy jurisdiction under the FSIA); *Federal Ins. Co. v. Richard I. Rubin & Co., Inc.* 12 F.3d 1270, 1288 (3d Cir. 1993) (there must be a nexus or substantive connection between cause of action and commercial activity to establish jurisdiction under the FSIA). *See also Republic of Argentina v. Weltover*, 504 U.S. 607 (1992) (direct effect means an effect which follows as an immediate consequence of the commercial activity).

In *Brown*, because plaintiffs failed to identify with any specificity the facts upon which their claim against VPI -- as opposed to their claims against the non-foreign sovereign defendants -- was based, plaintiffs necessarily failed to pinpoint any nexus between VPI's conduct and plaintiffs' claims. Indeed, plaintiffs could not identify a specific nexus because specificity is inconsistent with *in globo* pleading. As a result, as the *Brown* decision concedes, the Fifth Circuit has rewritten the FSIA to provide that once the sovereign is on "fair notice" of the activities upon which jurisdiction is claimed, even if only from the most remote and conclusory allegations, immunity is defeated. (App. 17a). Not only is this conclusion inconsistent with the purpose and precedent of the FSIA, it is inconsistent with the requirement that in every case the court's subject matter jurisdiction must be established before a case may proceed.

Whatever leniency notice pleading permits with regard to asserting claims, greater specificity is demanded with regard to allegations of jurisdiction. Federal courts are courts of limited jurisdiction, and therefore a party that invokes the jurisdiction must clearly establish the jurisdictional basis in order to proceed. *See, e.g., Kokkonen v. Guardian Life Ins. Co.*, 114 S. Ct. 1673, 1675 (1994) (federal courts are courts of limited jurisdiction; there is a presumption against federal jurisdiction and burden is on plaintiff to establish that jurisdiction exists); *See also NLFC, Inc. v. Devcom Mid-America, Inc.*, 45 F.3d 231, 237 (7th Cir.), *cert. denied*, 115 S. Ct. 2249 (1995); *Celli v. Shoell*, 40 F.3d 324, 327 (10th Cir. 1994); *Cedars-Sinai Med. Ctr. v. Watkins*, 11 F.3d 1573, 1584 (Fed. Cir. 1993), *cert. denied*, 114 S. Ct. 2738

(1994). Thus, Rule 8(a)(1) states: "A pleading which sets forth a claim for relief, . . ., shall contain (1) a short and plain statement of the grounds upon which the court's jurisdiction depends." Fed. R. Civ. P. 8(a)(1). *See also Hammes v. Aamco Transmissions, Inc.*, 33 F.3d 774, 778 (7th Cir. 1994) (Rule 8 requires plaintiff to plead sufficient facts to support federal jurisdiction). It is for this reason too that this Court has held that federal court jurisdiction under the FSIA must be established "at the threshold of every action . . . " *Verlinden*, 461 U.S. at 493-94.

Furthermore, the Fifth Circuit abandoned the heightened pleading standard that has been applied uniformly in qualified immunity cases, relying on this Court's direction in *Harlow v. Fitzgerald*, 457 U.S. 800 (1982). The Fifth Circuit, like other circuits, previously recognized this mandate in *Elliott v. Perez*, 751 F.2d 1472, 1479 (5th Cir. 1985), when it explained:

> Where, as here, plaintiffs' complaint alleges in broad, indefinite and conclusory terms . . . the groundwork is laid for . . . frustration of the protections and policies underlying the immunity doctrine.
>
> What is a federal trial judge to do? One thing he may not do: Face it as just another lawsuit in which the notice pleading's liberal policy of F. R. Civ. P. 8 counts on pretrial discovery to ascertain the factual basis for the claim.

Other circuits have similarly adopted a heightened pleading standard in qualified immunity cases. *See, e.g., Hunter v. District of Columbia*, 943 F.2d 69, 76 (D.C. Cir. 1991); *Oladeinde v. City of Birmingham*, 963 F.2d 1481, 1485 (11th Cir. 1992), *cert. denied*, 507 U.S.987 (1993); *Brown v. Frey*, 889 F.2d 159, 170 (8th Cir. 1989), *cert. denied*, 493 U.S. 1088 (1990). This heightened standard of pleading is required in qualified immunity cases -- where the subject matter jurisdiction of the district court is not at issue. The Fifth Circuit's decision in *Brown*, to accept a lesser standard of pleading in cases involving absolute immunity--where the jurisdiction of the district court is at issue--simply eviscerates foreign sovereign immunity.[4/] Where Congress has affirmatively acted to deprive district courts of jurisdiction, a foreign state should be entitled to the highest level of pleading specificity before its immunity is defeated.

The Supreme Court has held that immunity is not simply immunity from damages, but immunity from suit. *See Harlow v. Fitzgerald*, 457 U.S. 800, 817-18 (1982). The Ninth Circuit has reached the same conclusion. *Compania Mexicana*, 859 F.2d at 1358. So have several other circuits.

[4/] The Fifth Circuit's attempt to lessen this pleading standard in *Schultea v. Wood*, 47 F.3d 1427 (5th Cir. 1995) for qualified immunity cases, serves only to make the law on absolute immunity more uncertain. Once the foreign state has been compelled to answer a complaint, immunity is lost. *United States v. Moats*, 961 F.2d 1198, 1202-03 (5th Cir. 1992). *Schultea* will inevitably open the door for every District Court to apply a different standard when reviewing the sufficiency of a complaint, making it virtually impossible for foreign states involved in international trade to predict what conduct will and will not subject them to the jurisdiction of the courts of the United States.

See Gould, Inc. v. Pechiney Ugine Kuhlmann, 853 F.2d 445, 451 (6th Cir. 1988) (determination of subject matter jurisdiction during or after trial would be inappropriate since sovereign immunity is immunity from suit, not just liability); *Federal Ins. Co. v. Richard I. Rubin & Co., Inc.*, 12 F.3d 1270, 1281 (3d Cir. 1993) (sovereign immunity is immunity from trial and the attendant burdens of litigation); *Workman v. Jordan*, 958 F.2d 332, 336 (10th Cir. 1992) (qualified immunity is defense to liability and an entitlement to immunity from suit and other demands of litigation). But the *Brown* decision now abandons this principle and holds that once conclusory allegations of jurisdiction are made, a foreign sovereign must endure pretrial discovery and a full trial to vindicate its claim of immunity. Forcing a foreign state to proceed to trial in order to determine its immunity from suit vitiates the very purpose of immunity. *See Behrens v. Pelletia*, 116 S. Ct. 834, 838 (1996); *United States v. Moats*, 961 F.2d 1198, 1203; *Compania Mexicana*, 859 F.2d at 1358; *Gould*, 853 F.2d at 451.

VPI submits that because the Fifth Circuit's decision erroneously resolves a federal question of great import, conflicts in several respects with the rulings and standards applicable in other Circuits, grossly expands Federal court jurisdiction directly contrary to statutory limitations imposed by Congress, and in effect viscerates a statutory guarantee relied upon for twenty years in international commerce, the Supreme Court should review and reject the Fifth Circuit's recasting of foreign sovereign immunity.

B. In *Aldy*, the Fifth Circuit Abandoned the Requirement that Plaintiffs Present Evidence to Support a Claimed Exception to Immunity.

In *Aldy*, Valmet's summary judgment motion in the District Court and its appeal to the Fifth Circuit focused on plaintiffs' failure to present admissible evidence sufficient to establish "essential elements" of its claims required to invoke an exception to sovereign immunity. Since discovery was completed in *Aldy* and the jurisdictional issue was being raised in the context of a motion for summary judgment, plaintiffs had the burden of doing more than simply resting on the conclusory allegations of the complaint. At summary judgment plaintiffs must present evidence sufficient to discharge their burden of proof at trial. A "failure of proof concerning an essential element of [plaintiffs'] case" justifies the entry of summary judgment. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986); *Ryder International corp. v. First American National Bank*, 943 F.2d 1521 (11th Cir. 1991). At trial, plaintiffs would have the burden of proving the existence of jurisdiction by a preponderance of the evidence. *Northrup King Co. v. Compania Productora Semillas Algodoneras Selectas, S.A.*, 51 F.3d 1383, 1387 (8th Cir. 1995); *Villar v. Crowley Maritime Corp.*, 990 F.2d 1489, 1494 (5th Cir. 1993), *cert. denied*, 114 S. Ct. 690 (1994); *N.F.L.C.*, 45 F.3d at 237.

Valmet therefore was entitled to summary judgment unless plaintiffs presented evidence sufficient to prove the existence of jurisdiction. That meant, in the context of the FSIA, that plaintiffs had an obligation to present evidence

proving the existence of an exception to Valmet's immunity. Plaintiffs therefore had the burden of proving by a preponderance of the evidence that:

> the action is based . . . upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States.

28 U.S.C. § 1605(a)(2).

This substantial burden could be discharged only upon the submission of admissible, competent evidence that Valmet committed "an act" outside the United States and that this "act" causes a direct effect in the United States. *See, e.g., Stena Rederi AB v. Comision de Contratos*, 923 F.2d at 386; *America West Airlines*, 877 F.2d at 796. To find the "direct effect" required by the FSIA, plaintiffs had the burden of proving that the effect "follows 'as an immediate consequence of the defendant's . . . activity'." *Republic of Argentina v. Weltover, Inc.*, 504 U.S. at 618 (citation omitted).

Neither the District Court nor the Fifth Circuit reviewed the record to determine whether plaintiffs had "proved" the

existence of an exception to sovereign immunity.[5] The Fifth Circuit merely concluded:

> The plaintiffs maintain that Aldy's and Malone's deaths resulted from either the negligent design or manufacture of the paper machine or both . . . *These allegations are sufficient to confer subject matter jurisdiction* (citation omitted) (emphasis supplied).

(App. 10a-11a).

The Fifth Circuit looked only to the sufficiency of the allegations of the complaint as the jurisdictional basis, but that was not the question presented to the court. As demonstrated *supra*, it is plaintiff's obligation to prove, not merely allege conclusory statements of jurisdiction through the existence of an exception to immunity. This is certainly true when the issue of the district court's jurisdiction is present at summary judgment. In *Behrens v. Pelletier*, 116 S. Ct. 834, (1996), this Court held that distinct standards of proof apply to immunity determinations on motions to dismiss and motions for summary judgment.[6] This holding

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[5] The District Court failed even to consider the sovereign immunity issue on summary judgment, finding that its previous determination that the allegations of the complaint were sufficient to survive a motion to dismiss established subject matter jurisdiction and was now "law of the case." (App. 26a).

[6] The lack of immunity of a foreign state determines the jurisdiction of the district court, unlike the issues relating to qualified immunity in *Johnson v. Jones*, 115 S. Ct. 2151 (1991), and therefore may be challenged at each stage of the action subject to appeal at each stage as an

follows the Court's ruling in *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985) that:

> Even if the plaintiff's complaint adequately alleges the commission of acts that violated clearly established law, the defendant is entitled to summary judgment if discovery fails to uncover evidence sufficient to create a genuine issue as to whether the defendant in fact committed those acts.

The Fifth Circuit's decision not only failed to apply the standard mandated by this Court to review the denial of Valmet's summary judgment motion, but, like in *Brown*, it proceeded to rewrite the FSIA to strip immunity in any case where a plaintiff makes only the most conclusory allegations of design or manufacturing defects.

The Fifth Circuit concluded in *Aldy* that to defeat Valmet's sovereign immunity, confer subject matter jurisdiction on the District Court and force Valmet to trial, plaintiffs need only file "classic design and manufacturing defect suits, which the third clause of the commercial activities exception is broad enough to cover." (App. 10a). As such, the Fifth Circuit's decision makes clear that once the allegations are made, immunity is defeated until the issue is decided at trial. Forcing a foreign state to proceed to trial in order to determine its immunity from suit, however,

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interlocutory appeal. *See Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541 (1949).

vitiates the very purpose of immunity. *See Behrens*, 116 S. Ct. at 838; *Compania Mexicana*, 859 F.2d at 1358.

Valmet asked the district court to re-examine its initial decision on sovereign immunity in light of a discovery record which did not contain *evidence* sufficient to prove the existence of an exception under the FSIA. As discussed *supra*, proof of an exception to immunity requires evidence. *See 1976 U.S.C.C.A.N.* at 6616. *See also Joseph*, 830 F.2d at 1021. The Fifth Circuit erroneously declined to review the issue of jurisdiction in light of the record established by plaintiff

The Fifth Circuit's failure to apply the summary judgment standard of Rule 56, coupled with its holding that the third clause of § 1605(a)(2) requires nothing more than a boilerplate claim of a "design [or] manufacturing defect" is erroneous. *See Behrens*, 116 S. Ct. at 838. The Fifth Circuit's decision has erroneously resolved a federal question of great import, has created a conflict with the decisions of the Ninth Circuit, and should be corrected here.

II. THE FIFTH CIRCUIT'S DECISIONS IN *ALDY* AND *BROWN* ERRONEOUSLY PLACE IT IN DIRECT AND IRRECONCILABLE CONFLICT WITH DECISIONS BY THE SECOND CIRCUIT

In both *Aldy* and *Brown*, plaintiffs based jurisdictional claims in part on vague allegations of a failure to act, including failure to warn. In both *Aldy* and *Brown*,

Petitioners relied on the decisions in *In re Air Crash Disaster Near Warsaw, Poland*, 716 F. Supp. 84 (E.D.N.Y. 1989), *rev'd Filus v. Lot Polish Airlines*, 907 F.2d 1328 (2d Cir. 1990).[7] This case established the proposition that failure to warn claims are not cognizable under the FSIA. In *Aldy*, the District Court denied Valmet's motion to dismiss the failure to warn claims without even discussing the issue. Valmet raised the issue on appeal, but the Fifth Circuit erroneously concluded that the holding in the *In re Air Crash Disaster* case was not at odds with its view that failure to warn claims could be brought against foreign sovereigns under the FSIA. (App. 11a). The Fifth Circuit did not discuss the substance of its FSIA analysis on this point in the *Brown* decision. Instead, in *Brown*, the Fifth Circuit adopted and applied *Aldy*. Thus, this discussion, and the conflict with the Second Circuit, applies equally to *Brown* and *Aldy*.

In *In re Air Crash Disaster*, plaintiffs sued Lot Polish Airlines and the USSR in connection with the crash of an airplane. The issue was whether subject matter jurisdiction was present under the FSIA. Because the crash had occurred outside the United States, the only basis for jurisdiction was the second clause of § 1605(a)(2), which required that the action be based upon "an act performed in the United States in connection with commercial activity of the foreign state elsewhere." In its decision, the Eastern District of New York examined the legislative history of the FSIA to

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[7] The Second Circuit in *Filus* reversed the district court but specifically addressed and agreed with the district court's holding with regard to failure to warn claims.

determine whether a failure to warn could constitute the "act" necessary to state an exception to sovereign immunity. The court noted that:

> While the House Report adverts to "omissions," the reference is plainly to omissions in connection with the type of "act" such as one "that violates U.S. securities laws or regulations."

716 F. Supp. at 87. The court therefore concluded that a failure to warn was not an omission like that contemplated in the House Report and could not be an "act" upon which an exception to sovereign immunity could be based. *Id.* The court explicitly concluded that "it is hard to see how a failure to act can be deemed an 'act,'" and ruled that it therefore had no subject matter jurisdiction over the failure to warn claim. *Id.* The Second Circuit reviewed the District Court's decision and expressly agreed with Judge Nickerson's conclusion. 907 F.2d at 1333.[8/]

Confronted with a similar set of facts in *Aldy*, the Fifth Circuit erroneously reached a contrary conclusion. First, the Court asserted without citation or argument, that contrary to the holding in *In re Air Crash Disasters*, "an omission is an act" under the FSIA. (App. 11a). The Court did not discuss the legislative history of the FSIA -- which takes a contrary view of this issue -- or provide any other justification for its conclusion. *See U.S.C.C.A.N.* at 6616-6618. The Court then

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[8/] The Second Circuit reversed and remanded Judge Nickerson's ruling on other grounds.

attempted to distinguish *In re Air Crash Disaster* by writing that since that case was based on the second clause of § 1605(a)(2), its holding would not apply to this case, which involved the third clause of that section. (App. 12a n.2). That difference is no basis for the distinction claimed in the Fifth Circuit's opinion.

The Fifth Circuit's opinion claims that since the "act" had to occur in the United States to provide jurisdiction in *In re Air Crash Disaster*, the holding there is not applicable to this case where the "act" occurred outside of the United States. (App. 11a-12a). The Fifth Circuit thus suggests that the meaning of the word "act" changes from the second to the third clause of § 1605(a)(2) simply because the geographic location of the "act" has changed. *Id.* There is no legal or logical support for this distinction, and nothing in the *Air Crash Disaster* case to suggest that the geographic location of the "act" was critical to its definition or meaning. There is certainly nothing in the FSIA itself to support the argument that the meaning of the word "act" changes from clause to clause, or location to location.

Petitioners submit that the Fifth Circuit's opinion erroneously construed the word "act" in the third clause of § 1605(a)(2) in its decision. This erroneous construction of the statute places the Fifth Circuit in direct and irreconcilable conflict with the Second Circuit and raises significant questions regarding the scope of immunity for foreign sovereigns.

CONCLUSION

For the reasons set forth in this petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

Michael Evan Jaffe*
David L. Kelleher
ARENT FOX KINTNER
PLOTKIN & KAHN
1050 Connecticut Ave., N.W.
Washington, D.C. 20036-5339
(202) 857-6000
Counsel for Petitioners

Michael B. Wallace
PHELPS DUNBAR
200 S. Lamar Street
P.O. Box 23066
Jackson, MS 39225
(601) 352-2300

*Counsel of Record

APPENDICES

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 95-30295

LYNDA ALDY, on behalf of Charles Durwood Aldy,
Individually and as legal representative;

JANET M WALKER,
Plaintiffs - Appellees

versus

VALMET PAPER MACHINERY; GLOBE INC;
THORNTON INDUST INC; FENNER FLUID POWER;
FENNER P. L. C.; J. H. FENNER & CO. LTD,
Defendants

versus

VALMET OY,
Defendant - Appellant

versus

MARY ANN BUGGS MALONE; MARCUS T. MALONE;
KEITH T. MALONE; MIA SHALETTE MALONE,
Plaintiffs - Appellees;

LYNDA ALDY, on behalf of Charles Durwood Aldy,
Individually and as legal representative;

JANET M. WALKER,
Plaintiffs - Appellees

versus

VALMET PAPER MACHINERY; GLOBE INC;
THORNTON INDUST INC;
FENNER FLUID POWER; FENNER P. L. C.;
J. H. FENNER & CO LTD,
Defendants

versus

VALMET OY,
Defendant - Appellant

versus

MARY ANN BUGGS MALONE; MARCUS T. MALONE;
KEITH T. MALONE; MIA SHALETTE MALONE,
Plaintiffs - Appellees

March 6, 1996, Decided

JUDGES: Before REAVLEY, HIGGINBOTHAM and BARKSDALE, Circuit Judges.

OPINION: ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

PER CURIAM:

The Petition for Rehearing is DENIED and no member of this panel nor judge in regular active service on the court having requested that the court be polled on Rehearing En Banc, (FRAP and Local Rule 35) the Suggestion for Rehearing En Banc is also DENIED.

ENTERED FOR THE COURT:

PATRICK E. HIGGINBOTHAM
United States Circuit Judge

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 95-30295

LYNDA ALDY, on behalf of Charles Durwood Aldy,
Individually and as legal representative;

JANET M. WALKER,
Plaintiffs-Appellees,

versus

VALMET PAPER MACHINERY, GLOBE, INC.,
THORNTON INDUST. INC., FENNER FLUID POWER,
FENNER, P.L.C., and J.H. FENNER & CO., LTD.,
Defendants,

versus

VALMET OY, Defendant-Appellant.
MARY ANN BUGGS MALONE, MARCUS T. MALONE,
KEITH T. MALONE and MIA SHALETTE MALONE,
Plaintiffs-Appellees,

versus

VALMET PAPER MACHINERY and THORNTON
INDUSTRIES, INC.,

Defendants,

versus

VALMET OY, Defendant-Appellant.

74 F.3d 72

January 22, 1996, Decided

JUDGES: Before REAVLEY, HIGGINBOTHAM, and BARKSDALE, Circuit Judges.

OPINION: HIGGINBOTHAM, Circuit Judge:

This case presents the applicability of the commercial activities exception to the Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1602 et seq., in a products liability suit asserting failure to warn, design, and manufacturing defects in a machine designed and manufactured in Finland and installed in Louisiana. We conclude that the exemption is applicable and affirm the district court's refusal to dismiss for lack of jurisdiction.

I.

On March 18, 1991, Charles Aldy and Charley Malone were crushed to death while they were working in a paper machine at the Stone Container Corporation's paper mill in Hodge, Louisiana. Aldy's wife and daughter brought a wrongful death action naming, among others, the alleged

manufacturer of the paper machine, Valmet Paper Machinery, as a defendant under Louisiana's product liability statute. See La.R.S. §§ 9:2800.52-57. In a separate action, Malone's survivors sued VPI, also alleging that VPI's faulty design and construction of the paper machine caused Malone's death. VPI removed both actions to the United States District Court for the Western District of Louisiana. After the Aldys and the Malones discovered that VPI had no connection to the paper machine, they amended their complaints to name Valmet Oy as a defendant. Valmet had designed, manufactured, and supervised the on-site construction of the paper machine.

Valmet moved to dismiss the Aldys' complaint for lack of subject matter jurisdiction, claiming immunity under the Foreign Sovereign Immunities Act. Magistrate Judge Simon issued his report and recommendation concluding that the Aldys' suit fell within the commercial activities exception to the FSIA.[1] The Magistrate Judge pointed to the third clause of § 1605(a)(2), which provides that a foreign sovereign is not immune from suit in any case in which the action is based "upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States." The magistrate judge found that Valmet was in the business of producing paper-making machines in Finland and that the Aldys' suit was based upon Valmet's allegedly negligent acts of designing and manufacturing the paper machine in Finland. Moreover, the magistrate judge

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[1] 28 U.S.C. § 1605(a)(2).

found that the Aldys' complaint alleged that Valmet's faulty design and manufacture "caused a direct effect in the United States, that is the death of the plaintiffs' decedent."

In addition, the magistrate judge rejected Valmet's argument that the Aldys must identify specific defects in the design or manufacture of the paper machine that caused the accident in order to establish jurisdiction under the FSIA. While the magistrate judge noted that the failure to identify such defects would subject the Aldys to dismissal on a motion for summary judgment on the merits, he concluded that the complaint's allegations were sufficient to assert subject matter jurisdiction over the claims against Valmet. The district court adopted the magistrate judge's report.

Valmet moved for summary judgment in both the Aldys' and the Malones' suits. It reurged its argument that it was immune under the FSIA, this time because there was allegedly no evidence in the record to indicate that Valmet was negligent in designing or manufacturing the paper machine. The district court denied Valmet's motion, noting that the court had already addressed and rejected Valmet's FSIA arguments. The district court later consolidated the Aldy and Malone suits.

After discovery had been completed, Valmet once again moved for summary judgment. Valmet argued that the Aldys and Malones had failed to produce any evidence that the paper machine was unreasonably dangerous as a result of Valmet's design or manufacture of the machine. Once again, it reurged its argument that is was immune from suit under

the FSIA because the Aldys and the Malones had failed to demonstrate a specific defect in the design or manufacture of the paper machine. Finally, Valmet argued that Louisiana's statute of peremption barred their claims.

The district court disagreed and denied Valmet's motion. The district court found that the Aldys and Malones had produced sufficient evidence that the paper machine was unreasonably dangerous to withstand Valmet's motion for summary judgment. Regarding Valmet's FSIA argument, the district court noted that Valmet had not demonstrated any reason for the court to revisit its earlier rulings holding that the commercial activities exception applied to the Aldys' and Malones' claims against Valmet. Finally, the court held that Louisiana's statute of peremption only applied to contracts to build and not to contracts for the sale of immovable property. Noting that Valmet had only shown that it built the paper machine and then sold it to Stone Container's predecessor, the district court held that the Aldys' and Malones' suits were not barred by Louisiana's statute of peremption. This timely appeal followed.

II.

The denial of summary judgment is not a final order appealable under 28 U.S.C. § 1291, under the collateral order doctrine established in Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541, 93 L. Ed. 1528, 69 S. Ct. 1221 (1949), but we have jurisdiction over interlocutory orders denying claims of immunity under the FSIA. *Stena Rederi*

AB v. Comision de Contratos del Comite, 923 F.2d 380, 385 (5th Cir. 1991).

Valmet also appeals the district court's ruling that Louisiana's statute of peremption does not bar the Aldys' and Malones' suits. Unlike the district court's denial of sovereign immunity, the denial of summary judgment on the grounds of a statute of limitations is neither a final order, *Weinstock Hermanos & CIA Ltda v. American Aniline & Extract Co.*, 406 F.2d 1327, 1328 (3rd Cir. 1969), nor does it fit within that small category of claims subject to immediate appeal under the *Cohen doctrine. United States v. Levine*, 658 F.2d 113, 129 (3d Cir. 1981). We may not consider the merits of Valmet's statute of peremption argument.

III.

No one disputes that Valmet qualifies as a foreign sovereign. See 28 U.S.C. § 1603(b)(2). As such, it is immune from suit in the United States unless one of the enumerated exceptions to the FSIA applies.

The third clause of the commercial activities exception provides that a foreign sovereign is not immune from suit in any case in which the action is based "upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States." 28 U.S.C. § 1605(a)(2). The plain language of the provision limits our analysis to determining whether the Aldys' and Malones' lawsuits are 1) based upon an act outside the U.S., 2) that

was taken in connection with a commercial activity of Valmet outside the U.S.; and, 3) that caused a direct effect in the U.S. *Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607, 611, 119 L. Ed. 2d 394, 112 S. Ct. 2160 (1992).

The first two elements ensure that "there must be a connection between the plaintiff's cause of action and the commercial acts of the foreign sovereign." *Stena Rederi*, 923 F.2d at 386 (emphasis added). The Aldys' and Malones' suits are based upon the commercial acts of Valmet outside the U.S. Valmet does not dispute that it is in the business of designing and manufacturing paper machines in Finland, nor does it dispute that it designed and manufactured the paper machine in which Aldy and Malone were killed. Moreover, the gravamen of the plaintiffs' suits are that the paper machine "was unreasonably dangerous in its construction, make-up composition and design." In short, the plaintiffs' suits appear to be classic design and manufacturing defect suits, which the third clause of the commercial activities exception is broad enough to cover. See, e.g., *Ohntrup v. Firearms Center Inc.*, 516 F. Supp. 1281, 1286-87 (E.D. Pa. 1981), *aff'd*, 760 F.2d 259 (3d Cir. 1985).

Valmet's next contention that the plaintiffs have failed to prove that there is a direct causal nexus between Valmet's commercial activity and the plaintiffs' injuries fares no better. "An effect is 'direct' if it follows 'as an immediate consequence of the defendant's . . . activity.'" *Weltover*, 504 U.S. at 618. Although there may be instances in which the causal chain of events on which a plaintiff's suit is based is too attenuated to support subject matter jurisdiction under

the FSIA, this suit is not that case. The plaintiffs maintain that Aldy's and Malone's deaths resulted from either the negligent design or manufacture of the paper machine or both. Stated another way, the Aldys and Malones contend that Aldy's and Malone's deaths were an immediate consequence of Valmet's negligent design and manufacturing of the paper machine. These allegations are sufficient to confer subject matter jurisdiction. *See Ohntrup*, 516 F. Supp. at 1287 (holding that subject matter jurisdiction exists where defective product that was designed and manufactured abroad caused injury to U.S. purchaser).

Finally, Valmet argues that the commercial activities exception does not encompass failure to warn claims. Relying upon *In re Air Crash Disaster Near Warsaw, Poland*, 716 F. Supp. 84 (E.D.N.Y. 1989), *rev'd* on other grounds, 907 F.2d 1328 (2d Cir. 1990), Valmet argues that the failure to act is not an "act" sufficient to confer subject matter jurisdiction under the FSIA. We disagree. *In re Air Crash Disaster* held that "a failure to warn does not constitute an 'act performed in the United States in connection with a commercial activity of the foreign state elsewhere' as required by the second commercial activity exemption in the statute." 907 F.2d at 1333 (emphasis added). That case did not hold that a failure to warn of a defect in a product designed and manufactured outside the U.S. cannot be an act outside the U.S. sufficient to confer subject matter jurisdiction under the third clause of § 1605(a)(2). To the contrary, an omission is an act. The critical question is whether the plaintiff's suit is based upon an omission--the failure to warn--that occurred outside the

U.S. but caused a direct effect in the U.S.[2/] We have already answered that question in the affirmative in this case.

IV.

We AFFIRM the order of the district court denying Valmet's motion for summary judgment for lack of subject matter jurisdiction under the FSIA and we DISMISS Valmet's appeal from the district court's order denying its state law statute of peremption defense.

[2/] The third clause of § 1605(a)(2) was unavailable to the plaintiffs in In re Air Crash Disaster. The act upon which the plaintiffs had based their suit did not cause a direct effect in the U.S. since the deaths of plaintiffs' family members had occurred outside the U.S. Stated another way, the plaintiffs in that case were forced to argue that the failure to warn was an act inside the U.S.

APPENDIX C

No. 94-60732.

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Kenneth BROWN and Elmira Brown,
Plaintiffs-Appellees,

International Paper Company, Intervenor-Plaintiff-Appellee,

versus

VALMET-APPLETON, et al.,
Defendants,

Valmet Paper Machinery, Inc.,
Defendant-Appellant.

77 F.3d 860

March 18, 1996, Decided

Before POLITZ, Chief Judge, and JONES and PARKER, Circuit Judges.

OPINION: POLITZ, Chief Judge:

Valmet Paper Machinery, Inc. (VPI), a Finnish corporation, appeals the trial court's denial of a claim of sovereign immunity as a defense to plaintiffs' complaint. For the reasons assigned we affirm and remand.

Background

Kenneth Brown was employed by International Paper Company as an operator at the company's Moss Point, Mississippi paper mill. On August 1, 1990, Brown suffered serious injury when his right hand and arm were pulled into a paper winder. He has undergone several surgical procedures for the reconstruction of his arm and allegedly is maimed for life.

On July 6, 1993, Brown and his wife filed the instant action against, inter alia, VPI which responded with a motion to dismiss for lack of subject matter jurisdiction, invoking the Foreign Sovereign Immunities Act of 1976 (FSIA), codified at 28 U.S.C. §§ 1602 et seq.[1] In its motion, VPI averred that it was a wholly-owned subsidiary of Valmet Corporation, 70% of the stock of which is held by the Republic of Finland. As such, VPI claimed qualification as a foreign state under 28 U.S.C. § 1603[2] and concomitant

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[1] Fed. R. Civ. P. 12(b)(1); Argentine Republic v. Amerada Hess, 488 U.S. 428, 109 S. Ct. 683, 102 L. Ed. 2d 818 (1989).

[2] § 1603. Definitions

For purposes of this chapter [28 U.S.C. § 1602 et seq.]--

(continued...)

entitlement to sovereign immunity under 28 U.S.C. § 1604.[3] The district court denied this motion, applying the commercial activity exception to foreign sovereign immunity.[4] VPI timely appealed.

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[2](...continued)

(a) A "foreign state" ... includes a political subdivision of a foreign state or an agency or instrumentality of a foreign state as defined in subsection (b).

(b) An "agency or instrumentality of a foreign state" means any entity--

(1) which is a separate legal person, corporate or otherwise, and

(2) which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof, and

(3) which is neither a citizen of a State of the United States as defined in section 1332(a) and (d) of this title nor created under the laws of any third country.

[3] Section 1604. Immunity of a foreign state from jurisdiction
Subject to existing international agreements to which the United States is a party at the time of enactment of this Act a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided in sections 1605 to 1607 of this chapter.

[4] Section 1605. General exceptions to the jurisdictional immunity of a foreign state

(a) A foreign state shall not be immune from the jurisdiction of courts of the United States ... in any case--

(2) in which the action is based upon a commercial activity carried on in the United States by the foreign state; or

(continued...)

Analysis

The interlocutory order denying VPI's motion to dismiss, based upon a denial of sovereign immunity under the FSIA, is an appealable collateral order.[5] We review de novo the district court's legal conclusions concerning VPI's immunity under the FSIA; we examine for clear error the factual findings upon which those conclusions are based.[6]

VPI first contends that the plaintiffs do not allege with sufficient particularity the jurisdictional facts required to overcome the presumption of immunity created by 28 U.S.C. § 1604.[7] In considering this contention "we assume

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[4](...continued)

> upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States.

[5] Stena Rederi AB v. Comision de Contratos, 923 F.2d 380 (5th Cir.1991).

[6] Walter Fuller Aircraft Sales v. Rep. of Philippines, 965 F.2d 1375 (5th Cir.1992).

[7] VPI accords excessive weight to this presumption. In a determination of immunity under the FSIA, "once the defendant alleges that it is a "foreign state,' the plaintiff must produce some facts to show that the commercial activity exception to immunity applies, but the defendant retains the ultimate burden of proof on immunity." Arriba Ltd. v. Petroleos Mexicanos, 962 F.2d 528, 533 (5th Cir.1992) (citations omitted) (emphasis added). See also United States v. Moats, 961 F.2d 1198 (5th Cir.1992).

that we have truthful allegations before us though many of those allegations are subject to dispute"[8] and may, if appropriate, look to materials outside of the complaint to clarify disputed issues.[9] The plaintiffs allege, and information derived from interrogatories and other discovery devices support, the proposition that VPI was involved in the production, distribution, and/or installation of the paper winder which caused Brown's injuries.[10] VPI has received fair notice of the activities upon which the subject matter jurisdiction of the district court is premised.[11] This contention, therefore, is not persuasive.

VPI next challenges the merits of the district court's decision denying immunity. In Aldy v. Valmet Paper

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[8] Saudi Arabia v. Nelson, 507 U.S. 349, 349, 113 S. Ct. 1471, 1473, 123 L. Ed. 2d 47 (1993) (citation omitted).

[9] Moran v. Kingdom of Saudi Arabia, 27 F.3d 169 (5th Cir.1994).

[10] That the plaintiffs' allegations embrace the defendants *in globo* does not detract from their specificity. An acceptable reading of the pleadings alleges that each defendant engaged in the tortious conduct therein described. See Fed. R. Civ. P. 8(e)(2).

[11] VPI argues that a "heightened pleading requirement," similar to that utilized in cases where the affirmative defense of qualified immunity has been invoked, is applicable in FSIA cases. As we recently explained, however, there no longer exists a per se "heightened" pleading requirement in qualified immunity cases. *Schultea v. Wood*, 47 F.3d 1427 (5th Cir.1995) (*en banc*). Rather, in such cases any requirement that a plaintiff clarify the allegations set forth in his or her complaint arises solely out of the district court's discretionary authority to order a reply to a defendant's proffer of a qualified immunity defense. *Id*. Neither VPI nor the district court apparently perceived the need for that procedure and we do not reach that issue on appeal.

Machinery,[12] a panel of this court affirmed the denial of foreign sovereign immunity in a case involving facts essentially akin to those at bar. Finding any legal and factual variance between Aldy and the instant action irrelevant to today's decision, we adopt the careful and comprehensive reasoning of our colleagues and affirm the trial court's denial of immunity.

AFFIRMED and REMANDED for further proceedings consistent herewith.

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[12] 74 F.3d 72 (5th Cir.1996).

APPENDIX D

IN THE UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF LOUISIANA

MONROE DIVISION

Linda Aldy and Janet Walker
plaintiffs

versus

Valmet Oy
defendant

Consolidated Civil Action
No. 3:91:1270

Judge Tucker L. Melancon

Magistrate Judge John Simon

Mary Ann Buggs Malone, et al
plaintiffs

versus

Valmet Oy
defendant

ORDER

IT IS ORDERED that the "Motion for Summary Judgment or Dismissal for Lack of Subject Matter Jurisdiction" filed by defendant Valmet Oy be denied.

Thus done and signed this 1st day of March, 1995 at Monroe, Louisiana.

APPENDIX E

[Filed March 1, 1995]

IN THE UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF LOUISIANA

MONROE DIVISION

Linda ~~Aldy~~ and Janet Walker
plaintiffs

versus

Valmet Oy
defendant

Consolidated Civil Action
No. 3:91:1270

Judge Tucker L. Melancon

Magistrate Judge John Simon

Mary Ann Buggs Malone, et al
plaintiffs

versus

Valmet Oy
defendant

MEMORANDUM RULING AND ORDER

Before the Court is a "Motion for Summary Judgment or Dismissal for Lack of Subject Matter

Jurisdiction" filed by defendant Valmet Oy. For the reasons that follow, this motion is denied in its entirety.

Factual Background

The facts leading up to this litigation have been detailed in past orders of this Court and need not be reiterated. Since our last visit discovery has been completed, the Aldy plaintiffs have settled their claims against defendant J.H. Fenner & Co., and defendant Valmet Oy has moved again for summary judgment on and for dismissal of all claims brought against it by the plaintiffs. Both the Aldy and the Malone plaintiffs have opposed the motion.

Summary Judgments

A motion for summary judgment shall be granted if the pleadings, depositions, and affidavits submitted show both that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. FED. R. CIV. P. 56. Should the movant produce such evidence, the burden of proof shifts to the respondent to direct the attention of the court to evidence in the record sufficient to establish that there is a genuine issue of material fact requiring a trial. *Celotex Corp. v. Carrett*, 477 U.S. 317, 322-23, 106 S. Ct. 2548, 2552 (1986). The responding party may not rest upon mere allegations made in the pleadings as a means of establishing a genuine issue worthy of trial. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248-49, 106 S. Ct. 2505, 2510 (1986). If no issue of fact is presented and if the mover is entitled to judgment as a matter

of law, the court is required to render the judgment prayed for. *Celotex*, 477 U.S. at 323, 106 S. Ct. at 2552; FRCP 56(c). Before it can find that there are no genuine issues of material facts, the court must be satisfied that no reasonable trier of fact could have found for the non-moving party. *Lavespere v. Niagra Mach. & Tool Works, Inc.*, 910 F.2d 167, 178 (5th Cir. 1990).

Louisiana Products Liability Law

Defendant Valmet Oy initially seeks summary judgment on the merits of plaintiffs' claim against it. The claim arises under the Louisiana Products Liability Act. La. Rev. Stat. 9:2800.51 *et seq.* (West 1991). Defendant Valmet Oy has previously moved for and been denied summary judgment on the same issue. *See "Memorandum Ruling and Order" of 12/15/93.*

Under the LPLA, a manufacturer is liable for damages caused by a characteristic of the product that renders it unreasonably dangerous. As statutorily defined, *see* §2800.54(B), a product is "unreasonably dangerous" if and only if it is unreasonably dangerous:

(1) in either construction or composition;

(2) in design;

(3) because an adequate warning about the product has not been provided; or

(4) because it does not conform to an express warranty of the manufacturer about the product.

Valmet Oy requests judgment on several grounds, including a threshold issue: that the accident did not occur out of a reasonably anticipated use of the machine, that the machine was not defectively designed, that the machine was not defective in construction or composition, that the inadequate warning claim is unsupported, and that the accident was caused by an unreasonable alteration of the machine.

The Products Liability Analysis

In negligence or product liability cases, the use of summary judgement is rarely appropriate, even where the material facts are not disputed. *Trevino v. Yamaha Motor Corp., U.S.A.*, 882 F.2d 182, 184 (5th Cir. 1989). The Fifth Circuit has recognized two circumstances in which summary judgment might appropriately dispose of a negligence or products liability action:

(1) the resolution of the summary judgment motion turns upon legal issues, and not factual issues; and

(2) the evidence was insufficient to create a genuine issue of material fact concerning the defendant's alleged failure to comply with a normative standard.

Little v. Liquid Air Corp., 939 F.2d 1293, 1299 (5th Cir. 1991). As was the case in *Liquid Air*, neither of these circumstances are evident here.

The threshold requirement in any LPLA case is that the injury complained of arise from a "reasonably anticipated use" of the product. §2800.54(A). A "reasonably anticipated use" is defined by the LPLA as "a use or handling of a product that the product's manufacturer should reasonably expect of an ordinary person in the same or similar circumstances." §2800.53(7). Valmet Oy argues that the actions taken by the Stone Container employees in attempting to repair the stuck roller were not a reasonably anticipated use of the machine, and as such, the claims under the LPLA should be dismissed.

Even assuming without deciding that all of the facts are as Valmet Oy contends, this Court can not say that the actions taken by the Stone Container employees in attempting to repair the paper machine St within the meaning of the term "use" for LPLA purposes. To the extent those particular actions were a "use", this Court can not say that they were not "reasonably anticipated" and thus preclude the plaintiffs from trial.

As to the other claims arising under the LPLA, this Court docs not see where Valmet Oy has carried the burden imposed on it by *Celotex*. Valmet Oy must demonstrate that the evidence in the record insufficiently supports an essential element of the particular claims. 477 U.S. at 323, 106 S. Ct. at 2552. Even if Valmet Oy did properly carry this burden,

the response by the plaintiffs more than demonstrates that issues of fact material to these other contentions shall remain. *Liquid Air,* 939 F.2d at 1299. Summary judgment would be inappropriate on the present record.

The Peremption Claim

Defendant Valmet Oy also argues that plaintiffs' claims are time barred under Louisiana law. La. Rev. Stat. 9:2772(A) provides that:

> No action . . . shall be brought against any person performing or furnishing the design, planning, supervision, inspection, or observation of construction or the construction of an improvement to immovable property:
>
> (2) ... more than ten years after the improvement has been [ ] occupied by the owner;

It is undisputed that this action was Sled against Valmet Oy more than 10 years after Stone Container took possession of the paper machine. Defendant contends that the paper machine is an "immovable improvement" to the property on which it sits. As the designer and construction supervisor of the machine, the argument goes, Valmet Oy falls into the class of people encompassed by §2772(A) and is entitled to have this action dismissed.

Plaintiffs are correct in noting that it is not enough that the equipment manufactured by Valmet Oy ultimately became an improvement to immovable property. As held in *DeWoody v. Citgo Petroleum Corp.*, 604 So.2d 92, 99 (La. App. 3rd Cir. 1992), "the statute applies only to contracts to build, and not to contracts of sale." To be protected by §2772, Valmet Oy would have to prove that the machine itself was "construction or the construction of an improvement to immovable property." *Id.* Plaintiffs have shown that Valmet Oy only built the machine and sold it to the paper company. Another entity was contracted to, and did, install the machine in the paper mill. This fact clearly places Valmet Oy outside the scope of the statute.

Dismissal Under 12(b)(1)

Valmet Oy also moves for dismissal on the grounds that the Foreign Sovereign Immunity Act precludes this Court from exercising subject matter jurisdiction over it.

This is not the first time this issue has been addressed. By separate orders issued on March 31, 1993 and on December 15, 1993 this Court rejected this argument by defendant Valmet Oy. As noted before, these prior rulings are the law of the case, *Christianson v. Colt Industries Operating Corp.*, 486 U.S. 800, 816-17, 108 S. Ct. 2166, 2177 (1988), and will not be revisited without a showing that the initial decision was "clearly erroneous and would work a manifest injustice." *Arizona v. California*, 460 U.S. 605, 618 n. 8, 103 S. Ct. 1382, 1391 n. 8 (citation omitted). *See also Messinger v. Anderson*, 225 U.S. 436, 444, 32 S. Ct.

739, 740, (1912) (Holmes, J.); 1B J. Moore & T. Cumer, 0.404 (1980). Nothing that has been submitted with this most recent attempt convinces this Court that the prior rulings should be revisited. This motion is, again, denied.

APPENDIX F

[Filed December 15, 1993]

IN THE UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF LOUISIANA

MONROE DIVISION

LINDA ALDY and JANET WALKER — CIVIL ACTION
Plaintiffs — No. 3:91:1270

VERSUS

VALMET PAPER MACHINERY, MAGISTRATE SIMON
GLOBE, INC.,and
THORNTON INDUSTRIES
Defendants

MEMORANDUM RULING AND ORDER

Before the Court is a Motion for Summary Judgment filed by defendant Valmet Oy. For the reasons set out below, this motion is denied.

THE FACTUAL BACKGROUND

This case had its genesis in the death of Charles Aldy, husband and father to the plaintiffs. Aldy worked for Stone Container Corporation and was killed when he was

struck by part of a paper machine. The plaintiffs then filed suit under the Louisiana Products Liability Act against several defendants, including Valmet Oy. Valmet Oy had designed and manufactured the machine involved in the accident.

Valmet Oy is a Finnish corporation and considered an instrumentality of a foreign state by virtue of ownership by the Finnish government. With Valmet Oy's status as a foreign instrumentality, this Court has previously recognized that this matter falls within the purview of the Foreign Sovereign Immunities Act, 28 U.S.C. 1602 *et seq.* (West 1993). The FSIA precludes courts of the United States from exercising subject matter jurisdiction over such instrumentalities unless one of several exceptions apply. In an order signed on March 31, 1993 this Court ruled that subject matter jurisdiction was present. Valmet Oy then filed the present motion seeking a judgment on both its liability under the Louisiana Products Liability Act and on the immunity provided by the FSIA

THE APPLICABLE LAW

Summary Judgments

A motion for summary judgment shall be granted if the pleadings, depositions, and affidavits submitted show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Federal Rule of Civil Procedure 56 (West 1992). Once the movant produces such evidence, the burden shifts to the

respondent to direct the attention of the court to evidence in the record sufficient to establish that there is a genuine issue of material fact requiring a trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23, 106 S. Ct. 2548, 2552 (1986). The responding party may not rest upon mere allegations made in the pleadings as a means of establishing a genuine issue worthy of trial. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248-49, 106 S. Ct. 2505, 2510 (1986). If no issue of fact is presented and if the mover is entitled to judgment as a matter of law, the court is required to render the judgment prayed for. *Celotex*, 477 U.S. at 323, 106 S. Ct. at 2552; FRCP 56(c). Before it can find that there are no genuine issues of material facts, the court must be satisfied that no reasonable trier of fact could have found for the non-moving party. *Lavespere v. Niagra Mach. & Tool Works, Inc.*, 910 F.2d 167, 178 (5th Cir. 1990).

Liability As Manufacturer

The complaint asserts a claim against Valmet Oy under the Louisiana Products Liability Act. La. Rev. Stat. 9:2800.51 *et seq. (West* 1991). Under the LPLA, a manufacturer is liable for damages caused by a characteristic of the product that renders it unreasonably dangerous. As statutorily defined, §2800.34(B), a product is "unreasonably dangerous" if and only if it is unreasonably dangerous

(1) in construction or composition;

(2) in design;

(3) because an adequate warning about the product has not been provided; or

(4) because it does not conform to an express warranty of the manufacturer about the product.

It is also expressly required that the characteristic that renders the product unreasonably dangerous must exist at the time the product left the control of its manufacturer. §2800.54(C).

THE ANALYSES

The Products Liability Claim

In negligence or product liability cases, the use of summary judgement is rarely appropriate, even where the material facts are not disputed. *Little v. Liquid Air Corp.*, 939 F.2d 1293, 1299 (5th Cir. 1991); *Trevino v. Yamaha Motor Corp., U.S.A.*, 882 F.2d 182, 184 (5th Cir. 1989). The reasoning behind this principle is obvious:

> An inherently normative issue, such as whether a product is impermissibly dangerous or was defectively designed, is not, of course, susceptible to summary judgment.... The evidence requires balancing by the jury of the utility of the product against the likelihood of, and gravity of, injury from its use.

Fontenot v. Upjohn Co., 780 F.2d 90, 96 (5th (Cir. 1986). Consistent with this logic, this Court is unable to grant

judgment on the issue of Valmet's liability under the Louisiana Products Liability Act.

The pivotal issue in this case is whether the characteristic of the machine that resulted in the death rendered the machine unreasonably dangerous as defined by the Louisiana Products Liability Act. This is a question of fact best left to the province of the jury, and on the limited facts in the record, none of which rebut the allegation, this Court is unable to say that no reasonable trier of &ct could find for the plaintiffs on this issue. *See Lavespere, supra.*

The Immunity Defense

Defendant Valmet Oy also moves for summary judgment on the grounds of its potential immunity as an instrumentality of a foreign state. *See* the Foreign Sovereign Immunities Act, 28 U.S.C. 1602 *et seq.* (West 1993). This is not the first time Defendant Valmet Oy has submitted the FSIA as a potential bar to liability in this matter. Previously, Valmet Oy filed a motion to dismiss, claiming that the FSIA prevented this Court from exercising jurisdiction over it. The Magistrate Judge issued a Report and Recommendation that this motion be denied, and after reviewing both the Recommendation and the objections filed by Valmet Oy this Court found subject matter jurisdiction to exist. An order was entered denying the motion.

In the present Motion for Summary Judgment, Valmet Oy again submits that the FSIA provides immunity from suit. This suggested immunity does not appear to be discreet from the specific limitations on subject matter jurisdiction provided by the FSIA, and virtually all of the argument accompanying this aspect of the present motion

has been lifted verbatim from the previously denied motion to dismiss. The prior ruling by this court that subject matter jurisdiction over Valmet Oy exists is the law of the case, *Christianson v. Colt Industries Operating Corp.*, 486 U.S. 800, 816-17, 108 S. Ct. 2166, 2177 (1988), and this Court will not revisit it without a showing that the initial decision was "clearly erroneous and would work a manifest injustice." *Arizona v. California*, 460 U.S. 605, 618 n. 8, 103 S. Ct. 1382, 1391 n. 8 (citation omitted). *See also Messinger v. Anderson*, 225 U.S. 436, 444, 32 S. Ct. 739, 740, (1912) (Holmes,J.); 1BJ. Moore & J. Currier, ¶ 0.404 (1980).

ORDER

IT IS ORDERED that the Motion for Summary Judgment filed by defendant Valmet Oy be DENIED.

Thus done and signed this 15th day of December, 1993 at Shreveport, Louisiana.

DONALD E. WALTER
UNITED STATES DISTRICT JUDGE

APPENDIX G

[Filed March 31, 1993]

IN THE UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF LOUISIANA

MONROE DIVISION

LINDA ALDY, ET AL,

versus

VALMET OY

CIVIL ACTION NO. 91-1270
JUDGE WALTER
MAG. JUDGE SIMON

ORDER

For the reasons contained in the Report and Recommendation of the Magistrate Judge previously filed herein, and after an independent review of the entire record and the written objections filed herein, and concurring with the Magistrate Judge's findings under the applicable law;

IT IS ORDERED that motion of defendant, Valmet Oy, to dismiss the Third Amended and Supplemental Joint Petition of the plaintiffs for lack of subject matter jurisdiction is DENIED.

THUS DONE AND SIGNED, in Chambers, at Louisiana, on this 31st day of March, 1993.

DONALD E. WALTER
UNITED STATES DISTRICT JUDGE

APPENDIX H

[Filed March 8, 1993]

IN THE UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF LOUISIANA

MONROE DIVISION

LINDA ALDY, ET AL, Plaintiffs	CIVIL ACTION
VERSUS	NO. CV91-1270-M
	JUDGE WALTER
VALMET OY ET AL, Defendants	MAG. JUDGE SIMON

REPORT AND RECOMMENDATION OF MAGISTRATE JUDGE

The plaintiffs in this case are the wife and children of Charles Durwood Aldy, who they allege was killed on March 18, 1991, while working for Stone Container Corporation, a successor to Continental Can Company, Inc., in the State of Louisiana, when he was struck by a paper machine that had been designed and manufactured by defendant Valmet Oy, a Finnish corporation.

After filing complaints against other entities incorrectly believed to be the designer and/or manufacturer of the machine in question, the plaintiffs have finally been

successful in naming the manufacturer as Valmet Oy, an instrumentality of a foreign state, Finland, and have finally gotten past all of Valmet Oy's objections to service of process upon it. Now before the Court is a motion of Valmet Oy to dismiss the Third Amended and Supplemental Joint Petition for Damages, which is the first of the plaintiffs' complaints to actually name Valmet Oy as a defendant.

Valmet Oy's motion is based on its contention that this Court lacks subject matter jurisdiction over it because it is an instrumentality of a foreign state. The plaintiffs and Valmet Oy agree that Valmet Oy is an instrumentality of a foreign state, and as such falls within the purview of the Foreign Sovereign Immunities Act ("FSIA").[1/] This means that Valmet Oy is immune from the jurisdiction of the courts of the United States unless one of the six exemptions to immunity set out in §1604 of the FSIA takes away Valmet Oy's sovereign immunity in this case. (28 U.S.C. §§1605(a)(1)-(6)). There is no dispute that the only exceptions that could possibly apply in this case are those found in subparagraph (a)(2), the Commercial Activities Exceptions, or in subparagraph (a)(5), the Non-Commercial Tort Exception.

The Non-Commercial Tort Exception

In a report and recommendation which I issued in this case on November 19, 1992, concerning whether the complaint should be dismissed because it had not been properly served on Valmet Oy, I discussed the issue which is now before the Court. Even though that issue was not properly before the Court at that time, I commented on it

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1/ See plaintiffs' recent memorandum, P5.

because both parties had briefed it, and I found that the complaint, as amended, alleged facts which brought the case under the subparagraph (a)(5) exception because it alleged that money damages were sought against Valmet Oy for the death of the plaintiffs' decedent which occurred in the United States, which was allegedly caused by the tortious act or omission of Valmet Oy.

The parties have now submitted additional authorities which have convinced me that I was incorrect in concluding that this Court would have subject matter jurisdiction against Valmet Oy under §1605(a)(5), because I mistakenly assumed that the tortious act or omission mentioned in the statute could occur anywhere.

Subparagraph (a)(5) provides an exception to sovereign immunity for a claim

> "[I]n which money damages are sought against a foreign state for personal injury or death, or damage to or loss of property occurring in the United States and caused by the tortious omission of that foreign state or of any official or employee of that foreign state while acting within the scope of the office or employment;"

Contrary to my prior understanding, all of the jurisprudence that has been cited to me requires that the entirety of the tortious activity must have occurred in the United States for the exception to apply. See Asociacion de Reclamantes v. United Mexican States, 735 F.2d 517, 524 (D.C. Cir. 1984) cert den 470 U.S. 1051, 105 S. Ct. 1751, 84 L.Ed.2d 815 (1985); Persinger v. Islamic Republic of Iran,

749 F.2d 835, 840 (D.C. Cir. 1984); Four Corners Helicopters, Inc. v. Turbomeca S.A., 577 F. Supp. 1096, 1102 (D. Colo. 1988); Matter of Sedco, Inc., 543 F.Supp. 561, 567 (S.D. Texas 1982).

Indeed, the plaintiffs do not argue with this statement of the law, but contend that the tortious acts which they allege caused the death of their decedent occurred in the United states. However, in support of this contention, they simply say that Valmet Oy's soliciting and selling its product within the United States was the tortious act which occurred in the United States. Of course, the sale of the machinery in the United States could not be a tortious act at all in the context of this lawsuit.

The amended complaint which Valmet Oy seeks to dismiss alleges that Valmet Oy manufactured and/or designed the machine in question, that the machine and/or its component parts were unreasonably dangerous in their construction, composition, and/or design, and that the machine lacked adequate warning and/or instructions for its use, did not conform to the express warranty of Valmet Oy, and that the complained of characteristics of the machine were a proximate cause of the incident which resulted in the injuries to and death of Charles Durwood Aldy.

Moreover, paragraph 8 of the amended complaint alleges that "the characteristic of the product which rendered it unreasonably dangerous existed at the time it left the control of the defendants and/or resulted reasonably anticipated alteration and/or modification of the said product."

Thus, it is obvious that all of the allegations of the complaint which charge responsibility on the part of Valmet Oy allege activities of Valmet Oy that would have to have occurred at the place of manufacture or design of the machine, which was presumably in Finland.

Since none of the contended tortious actions of Valmet Oy are even alleged to have occurred in the United States, the noncommercial tort exception of subparagraph (a)(5) is clearly not applicable in this case.

The Commercial Activities Exceptions

It is obvious that the only other exceptions which might possibly be pivotal in this case are those contained in the first and third clauses of §1605(a)(2). The first clause provides that foreign sovereign immunity is unavailable in any action:

> "In which the action is based upon a commercial activity carried on in the United States by the foreign state;"

Valmet Oy correctly argues that this clause requires the action to be "based upon" a commercial activity carried on in the United States and it then contends that the amended complaint in question does not even allege any commercial activity by Valmet Oy in the United States. Even though it is true that the third amended complaint, itself, does not make such allegations, the plaintiffs have, in their latest brief, and briefs which they have previously filed, contended that Valmet Oy sold the paper machine which is the subject of this action to Continental Can Company and installed the machine at Hodge, Louisiana, pursuant to a contract between Valmet Oy and Continental Can Company. A copy of the

alleged contract of sale of the machine was attached as Exhibit D to the plaintiffs' memorandum in opposition to Valmet Oy's prior motion to quash service and dismiss the complaint, and although the plaintiffs did not submit the copy of the contract by affidavit, Valmet Oy has made no contention in any submission to this Court that the copy of the contract submitted by the plaintiffs is not a true copy of the contract by which the machine in question was sold by Valmet Oy to Continental Can Company.[2/] Therefore, I will consider the submitted copy of the contract as authentic and, for the purpose of determining subject matter jurisdiction, as a supplement to the plaintiffs' complaint that alleges that Valmet Oy sold the machine in question to Continental Can company, Inc., at Hodge, Louisiana, in the year 1970.

Next, Valmet Oy contends that the first clause of the commercial activity exception requires proof of a "significant nexus" between the plaintiffs' claim and the sovereign's commercial activity in the United States, and contends that the commercial activity relied upon by the plaintiff to establish jurisdiction must be specific acts that form the basis of the suit. Citing America West Airlines, Inc. v. GPA Group Ltd., 877 F.2d 793, 796 (9th Cir. 1989).

The plaintiffs point to the sale of the paper machine by Valmet Oy in the United States as the commercial activity carried on in the United States on which this action is based. However, as previously noted, the sale of the machine in the United States is not one of the specific acts that forms the basis of the suit. The sale of the machine could not be a specific act that caused the death of the

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[2/] If Valmet Oy wishes to make any such contention, it may do so as a part of an objection to this Report and Recommendation.

plaintiffs' decedent. The specific acts that form the basis of the suit are the alleged defective design and/or manufacture of the machine in Finland, and the alleged lack of warnings given at or from that location. Therefore, the first clause of the commercial activities exception is not applicable in this case.

It appears, however, that the third clause is applicable in the case at bar. It provides that foreign sovereign immunity is unavailable in any action:

> "In which the action is based...upon an act outside the territory of the United States in connection with the commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States."

The commercial activity of Valmet Oy elsewhere is its business of producing paper making machines in Finland, and the acts outside the territory of the United States in connection with that commercial activity are the alleged acts of faulty design and/or manufacture of the machine in question. The plaintiffs' petition alleges that those faulty acts of design and/or manufacture caused a direct effect in the United States, that is the death of the plaintiffs' decedent.

Valmet Oy contends that the third clause requires proof of an immediate causal connection between the defendant's "commercial activities" and the facts giving rise to the lawsuit, citing Four Corners Helicopters, supra, 677 F. Supp. at 1096 and Tucker v. Whitaker Travel, Ltd., 620 F. SUPP. 578 (E.D. Pa. 1985), aff'd 800 F.2d 40 (3rd Cir.), cert. denied 479 U.S. 986 (1986). However, both of the cited cases can be distinguished from the case at bar.

In Four Corner Helicopters, the damage complained of was caused by the failure of the helicopter engine, and the plaintiff conceded that the engine was installed not by the foreign entity claiming immunity, SNIAS, but by another defendant. The court stated that, "No allegation is made to the effect SNIAS had any role in the importation of the salvaged helicopter hull into the United States. The complaint does not provide any basis for inferring the effect in this country was foreseeable or the immediate causal effect of an act of defendant SNIAS or was substantial." 677 F. SUPP. at 1101. In the case, at bar, however, the plaintiffs allege that Valmet Oy sold the machine in question directly to a company in Louisiana and the complaint provides a basis for inferring that its alleged effect in this country was foreseeable and substantial.

In Tucker v. Whitaker Travel, plaintiffs were seeking damages for injuries sustained while horseback riding in the Bahamas. The decision in that case, like many others interpreting this clause, simply holds that the direct effects of the foreign sovereign's alleged tortious conduct was only plaintiff's injuries, which occurred outside the United States, and that whatever pain and pecuniary loss the plaintiff suffered in the United States were indirect consequences of the accident in the Bahamas. 620 F. SUPP. at 586 and cases cited there.

The case of Republic of Argentina v. Weltover, Inc., a case cited by Valmet Oy, 112 S. Ct. at 2168, supports the plaintiffs' position. In that case, the Court had no difficulty concluding that Argentina's unilateral rescheduling of maturity dates on bonds had a "direct effect in the United States because New York was the place of performance for Argentina's ultimate contractual obligations, and money that

was supposed to have been delivered to a New York bank for deposit was not forthcoming."

A case that is almost directly on the point here in question, is Ohntrup v. Firearms Center, Inc., 516 F. SUPP. 1281 (E.D. Pa. 1981) aff'd. 760 F.2d 259 (3d Cir. 1985).[3/] In Ohntrup, gun buyers in the United States brought a products liability suit against gun sellers seeking recovery for injuries sustained from the malfunction of a gun the buyers had purchased from the sellers in the United States. The gun sellers then impleaded the Turkish company that had manufactured the gun whose stock was wholly owned by the Turkish government, and the plaintiffs then amended their complaint to include claims against that manufacturer. The Turkish manufacturer moved to dismiss the claims against it on the ground of sovereign immunity, but the Court found the Turkish manufacturer subject to jurisdiction under the third clause of the commercial activity exception, even though the sales agreement between the Turkish company and the U.S. seller was concluded in Turkey, and the pistols were delivered in Turkey. The Court recognized that the "direct effect" within this country must be substantial, and a foreseeable consequence of the actions performed elsewhere. However, the Court pointed out that the plaintiff had alleged that he was injured in the United States by a defective pistol which he bought in the United States from the seller, that the pistol was alleged to have been supplied to the seller by the Turkish manufacturer pursuant to an agreement which contemplated that the pistols would be sold in the U.S.A., and concluded from that the manufacturer did foresee that

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3/ Strangely, this case was not cited by either party, but is the only one that I have found that involves a factual situation which is closely analogous to the case at bar.

some pistols supplied pursuant to the sales agreement and sold in the United States could be defective. The Court then concluded that the injury in the United States of a purchaser of such a defective gun was both a substantial and foreseeable consequence of the manufacturer's actions.

The sales contract of the machine in question in the case at bar provides on the unnumbered page after page 24 that the price of the machine includes $30,000.00 for erection, supervision and start up assistance, presumably to be provided in Hodge, Louisiana, by Valmet Oy.

The manufacturer of any product, particularly complicated product such as the paper machine here in question[4/] has to know that there is a possibility that the machine may be defective in some way which could cause injury to someone. The alleged injury and death in the United States of the plaintiffs' decedent by the allegedly defective paper making machine was both a substantial and foreseeable consequence of the actions of Valmet Oy alleged in the complaint.

Valmet Oy asserts that to establish jurisdiction under the FSIA, the plaintiffs must identify specific defects in the design or manufacture of the paper machine by Valmet Oy that resulted in the accident, but they do not cite any authority for such a statement. "Even if a plaintiff's allegations of jurisdiction are insufficient or entirely lacking but there are facts pleaded in the complaint from which jurisdiction may be inferred, then a motion to dismiss for lack of subject matter jurisdiction must be denied."

4/ As can be determined from the descriptions of the various parts of the machine in the sales contract.

Wright & Miller, Federal Practice and Procedure: Civil 2d §1350 (1990) pp. 221-222 § n. 40.

If the plaintiffs are actually unable to identify specific defects in the design or manufacture of the paper machine, they may be subject to dismissal on a motion for summary judgement, but the allegations of the complaint, considered with the allegations (asserted by memorandum brief) as to the sale of the paper machine by Valmet Oy in the United States to Continental Can Company, sufficiently assert the jurisdiction of this Court under the third clause of §1605(a)(2).

In short, the complaint, as supplemented, asserts that Valmet Oy designed and manufactured a paper making machine in Finland that it sold in the United States, and that defects in the design or manufacture of the machine which occurred in Finland caused the plaintiffs' decedent to be killed in the United States. This is sufficient to allege jurisdiction under the third clause of 28 U.S.C. §1605(a)(2).

Conclusion

For all of the foregoing reasons, IT IS RECOMMENDED that Valmet Oy's motion to dismiss the Third Amended and Supplemental Joint Petition of the plaintiffs for lack of subject matter jurisdiction be DENIED.

Under the provisions of 28 U.S.C. S 636(b)(1)(C), the parties have ten (10) business days from service of this Report and Recommendation to file any objections with the Clerk of Court. Timely objections will be considered by the district judge before he makes a final ruling.

FAILURE TO FILE WRITTEN OBJECTIONS TO THE PROPOSED FINDINGS AND RECOMMENDATIONS CONTAINED IN THIS REPORT WITHIN TEN (10) BUSINESS DAYS FROM THE DATE OF ITS SERVICE SHALL BAR AN AGGRIEVED PARTY FROM ATTACKING THE FACTUAL FINDINGS ON APPEAL.

THUS DONE AND SIGNED at Alexandria, Louisiana, on this 8th day of March, 1993.

JOHN F. SIMON
UNITED STATES MAGISTRATE JUDGE

APPENDIX I

[Filed October 17, 1994]

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF MISSISSIPPI
SOUTHERN DIVISION

KENNETH BROWN AND ELMIRA BROWN

VS. CIVIL ACTION NO. 1:93-CV-327(Br)(R)

VALMET-APPLETON, INC., ET AL DEFENDANTS

MEMORANDUM OPINION AND ORDER

Before the Court is the motion of Valmet Paper Machinery, Inc., ("VPI") to dismiss the complaint and the amended complaint pursuant to Federal Rules of Civil Procedure 12(b)(1). As grounds, the Defendant asserts that VPI is a "foreign state" as defined in the Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. §§ 1602-1622, and, as such, is immune from the claims asserted.

Plaintiffs originally brought this action against six defendants, including four unidentified defendants as well as defendants Valmet-Appleton, Inc., ("VAI") and VPI. By Order dated March , 1994, the Court granted Plaintiffs leave to amend their complaint to add two additional Defendants, B.E.& K. Construction Company and General Electric Company. Plaintiffs seek recovery for injuries sustained by Plaintiff Kenneth Brown in an industrial accident which occurred at International Paper Company, Moss Point, Mississippi, on August 1, 1990. At the time of the accident

Mr. Brown was working on a KL 1000 V-Winder which, from the documents submitted, was designed, manufactured and sold at the Moss Point Mill by defendants VPI and VAI. The Plaintiff was injured as they attempted to splice a break in the paper, and his fingers were caught either in the paper or in the machinery. As a result, his right hand, arm and wrist were injured.

As stated, VPI moves for dismissal on grounds that it is a "foreign state" as defined by FSIA, 28 U.S.C. §§ 1602-16.

VPI is a corporation organized under the laws of the Republic of Finland with its principal place of business in Helsinki, Finland. VPI is a wholly owned subsidiary of Valmet Corporation, also a corporation organized under the laws of the Republic of Finland with its principal place of business being in that country. Allegedly, and for the purpose of this motion, it is assumed that the Republic of Finland owns in excess of 70% of the outstanding shares of Valmet Corporation.

Thus, the first question is whether or not VPI is a "foreign state" inasmuch as the majority of its stock is owned by the Republic of Finland. If so, VPI is immune from suit in the United States unless the action sub judice falls within one of the exceptions to immunity as outlined by the statute. See 28 U.S.C. § 1604.

As to the first question, the defendant argues that VPI is an instrumentality of a state" as defined by the FSIA. See 28 U.S.C. § 1603(b)(2). The plaintiffs, without convincing citation, argue that corporations must be entirely owned by a foreign state to qualify for the immunity.

This Court is not inclined to address this issue for the reason that even if the defendant is correct in asserting that VPI is a "foreign state," as defined in the FSIA, clearly the commercial activity exception applies, and the motion should be denied. At least at this stage of proceedings, the factual findings regarding subject matter jurisdiction appear to be intertwined with the merits, and dismissal would be premature. If, however, after discovery there are additional facts which are pertinent to the issue, then an appropriate motion may be filed with the Court.

COMMERCIAL ACTIVITIES EXCEPTION

The commercial activities exception provides that foreign sovereign immunity is unavailable in an action

> "in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States."

28 U.S.C. § 1605(a)(2).

The relevant clauses of this exception are:

(1) where the action is based upon commercial activities in the United States, or

(2) where an act outside the territory of the United States in connection with commercial activities of the foreign state causes a direct effect in the United States.

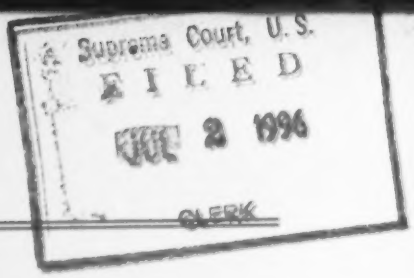
Is there a significant nexus between the plaintiffs' claim and the commercial activities of VPI? See U.S. v. Moats, 961 F.2d at 120S; Stena Rederi AB v. Comision de Contratos de Comite Electuivo General, 923 F.2d at 386. The complaint alleges that the Defendant, VPI, designed, manufactured, sold and distributed the paper winder equipment which, according to the complaint, was defective. The defendant argues that these assertions are "boiler plate" and that the plaintiffs' claim is not based upon an act but upon the absence of an act. We disagree. Although the allegations are somewhat generic, the manufacture and distribution of a defective product coupled with a failure to warn, a failure to test and a failure to inspect is more than "a mere failure to act." See In re Air Crash Disaster Near Warsaw, Poland, 716 F. SUPP. 84 (S.D.N.Y. 1989), rev'd on other grounds, Filus v. LOT Polish Airlines, 907 F.2d 1328 (2d Cir. 1990). While, certainly, a failure to warn may be, under some circumstances, classified as "a failure to act," clearly, the manufacture and distribution of products is commercial activity contemplated by the referenced exception to immunity. And, again, the jurisdictional facts and the facts underpinning this cause of action are so intertwined that this motion to dismiss should be denied. See Clark v. Tarrant County, Texas, 728 F.2d 736, 741 (5th Cir. 1986).

At this point, the Court is convinced that an evidentiary hearing on these matters is unnecessary. However, should discovery reveal matters which give rise to future dispositive motions, such a hearing may be warranted.

Wherefore, the motion of Valmet Paper Machinery, Inc., to dismiss is hereby DENIED.

SO ORDERED this the 13th day of October, 1994.

United States District Judge



No. 95-1947

In The

Supreme Court of the United States

October Term, 1995

VALMET OY,

Petitioner,

v.

LYNDA ALDY, JANET WALKER, MARTHA ANN BUGGS MALONE, MIA MALONE, KEITH MALONE AND MARCUS MALONE,

Respondents.

and

VALMET PAPER MACHINERY, INC.,

Petitioner,

v.

KENNETH AND ELMIRA BROWN, ET AL.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

PAUL S. MINOR
MARK D. LUMPKIN
MINOR AND ASSOCIATES
P. O. Drawer 1388
Biloxi, MS 39533
601/374-5151

Counsel for Respondents

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

16 pp

QUESTIONS PRESENTED FOR REVIEW

1. Whether the petition for writ of certiorari is a frivolous case which does not engage the jurisdiction of this Court?

2. Is proof required beyond uncontroverted evidence that a foreign sovereign manufactured, designed, solicited, sold, assembled, installed, and guaranteed a defective paper winder machine which seriously injured plaintiff/respondent at the Moss Point, Mississippi, International Paper Company plant in order to establish the existence of an exception to the Foreign Sovereign Immunities Act, 28 U.S.C. § 1330(a)(1993), 28 U.S.C. § 1605(a)?

LIST OF INTERESTED PARTIES

1. Kenneth Brown, Plaintiff/Respondent
2. Elmira Brown, Plaintiff/Respondent
3. Paul S. Minor, Counsel for Plaintiff/Respondent
4. Mark D. Lumpkin, Counsel for Plaintiff/Respondent

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OPINIONS BELOW

The United States Court of Appeals for the Fifth Circuit rendered opinions reported as *Aldy v. Valmet Oy*, 74 F.3d 72 (5th Cir. 1996), and *Brown v. Valmet-Appleton, Inc.*, 77 F.3d 860 (5th Cir. 1996). These opinions are not in direct conflict with any other appellate court decisions, and specifically the decision of the United States Court of Appeals for the Second Circuit in *In Re: Air Crash Disaster Near Warsaw, Poland*, 716 F.Supp. 84 (E.D.N.Y. 1989), *rev'd Filus v. Lot Polish Airlines*, 907 F.2d 1328 (2d Cir. 1990), or the decision of the United States Court of Appeals for the Ninth Circuit in *Joseph v. Office of the Consulate General*, 830 F.2d 1018, 1021 (9th Cir. 1987), *cert. denied*, 485 U.S. 905 (1988), as urged by petitioner.

JURISDICTION AND FEDERAL STATUTORY PROVISIONS

Plaintiffs/respondents would show that a frivolous case does not engage the jurisdiction of the Court. *Beauchamp v. Sullivan*, 21 F.3d 789 (7th Cir. 1994) *citing Bell v. Hood*, 327 U.S. 678, 682-683, 66 S.Ct. 773, 776, 90 L.Ed. 939 (1946); *Crowley Cutlery v. United States*, 849 F.2d 273 (7th Cir. 1988). Given the frivolous nature of this petition, plaintiffs/respondents object to all recitations made by Valmet Paper Machinery, Inc. ("VPI") concerning jurisdiction over this appeal. Plaintiffs/respondents request that VPI and its attorneys be held personally liable for just damages, double costs, expenses, and attorneys' fees

because VPI and its counsel have unreasonable and vexatiously multiplied the proceedings in this case. 28 U.S.C. § 1927.

STATEMENT OF THE CASE

Perhaps because of its impotent position,[1] petitioner's statement of the case confuses, omits and misstates numerous material facts. On or about August 1, 1990, the respondent, Kenneth Brown, a resident of Richton, Mississippi, was employed by International Paper Company ("IP") in Moss Point, Mississippi, as an operator. On this date, Mr. Brown was working on a KL-1000 V-Base paper winder designed, manufactured, sold, assembled, and installed at the Moss Point, Mississippi, paper mill by the petitioner VPI. Because of serious design defects with the VPI paper winder, Mr. Brown's right hand, wrist, and arm were viciously pulled into the paper winder degloving his right hand and mangling and crushing his right arm.

On or about July 6, 1993, the respondents filed the subject product liability action against VPI and other defendants asserting the paper winder was defectively manufactured, defectively designed, and lacked sufficient warnings, instructions, and safety devices.

VPI never answered the complaint. On or about October 22, 1993, VPI filed a motion to dismiss asserting

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[1] During oral argument, Judge Edith Jones admonished petitioner's counsel that its appeal was very weak. (*See* Transcript of oral argument).

that it was immune from suit in the United States, and not subject to the jurisdiction of the United States District Court under the Foreign Sovereign Immunities Act (FSIA), 28 U.S.C. §§ 1602-1611 (1992). This was the first time that plaintiffs were apprised that VPI considered itself to be a foreign sovereign within the meaning of the FSIA. In response thereto, the plaintiff/respondents sustained their burden of proof by presenting substantial evidence that conclusively establishes that VPI's actions came within several specifically enumerated exceptions to the FSIA (28 U.S.C. §§ 1605(a)(1), (2) and (5)). (R. 87-183; 208-13; 216-17; 220; 226; 236-37; 464-68; 486-538; 542-72; 637-40; 674-95; 714-21; 735-38).[2]

Because VPI offered absolutely no evidence to rebut plaintiffs' claims, it is uncontradicted that VPI designed, manufactured, installed, assembled, sold, guaranteed and

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[2] Of particular interest is VPI's response to request for admissions wherein it admitted that it participated in the design, installation, assembly and sale of the subject paper winder (R. 714-22); the specific design defects identified by plaintiff/respondent's expert, Dr. Charles Benedict (R. 689-91); that VPI guaranteed and warranted the winder at issue (R. 95-99); that VPI by contract agreed "to comply with the workers' compensation laws of the state in which the work is being performed", assumed liability for all damage or injury, agreed to obtain liability and property damage insurance for "claims for property damage, personal injury or accidental death", agreed to indemnify and save harmless plaintiffs/respondents' employer and intervenor, International Paper Company, *and its employees* against any loss, damage, injury or expense, waived immunity regarding any suit by International Paper Company, and expressly represented that it would comply with all local, state and federal rules, regulations and requirements in its production of goods, equipment and services (R. 113).

assumed liability for all damage or injury caused by its paper winder, agreed to obtain liability and property damage insurance for claims for personal injury, agreed to indemnify and hold IP harmless, expressly waived any immunity from suit, expressly represented that it would fully comply with all applicable rules, regulations and requirements in its production of goods, equipment and services, provided supervisors to oversee the installation of the product, and other matters contained in the record. (R. 87-183; 208-13; 216-17; 220; 226; 236-37; 464-68; 486-538; 542-72; 637-40; 674-95; 714-21; 735-38). These activities clearly bring VPI within the enumerated exceptions to the FSIA, 28 U.S.C. § 1605(a).

The district court, after considering the ample evidence before it, determined that: "At the time of the accident, Mr. Brown was working on a KL-1000 V winder which, from the documents submitted, was designed, manufactured, and sold at the Moss Point, Mississippi, mill by defendants VPI and VAI [Valmet-Appleton, Inc.]." (R. 729). Continuing, the district court stated: "[C]learly the commercial activities exception applies and [VPI's] motion should be denied." (R. 730-731).

The matter was then appealed to the United States Court of Appeals for the Fifth Circuit which, after oral argument, affirmed the district court's findings.

VPI then petitioned for certiorari to this Court, misrepresenting that a conflict existed between the Fifth Circuit's decision in *Brown* and *Aldy*, and the Ninth Circuit's decision in *Joseph v. Office of the Consulate General, supra*, and the Second Circuit's decision in *In re: Air Crash Disaster Near Warsaw, Poland, supra.*

CORRECTION OF MISSTATEMENTS IN THE PETITION

The opinions of the district court and the United States Court of Appeals for the Fifth Circuit correctly sets forth the facts of this case. These opinions accurately depict the fact that plaintiffs/respondents, through their complaint and through information derived from interrogatories, presented ample evidence that VPI was involved in the sale, production, distribution and/or installation of the paper winder which caused plaintiff/respondent's injuries. "VPI has received fair notice of the activities upon which the subject matter jurisdiction of the district court is premised." (*See* App. 17A).

Pursuant to the United States Supreme Court Rule 15.2, plaintiffs/respondents bring the following misstatements of fact contained in the petition to the Court's attention. Respondents respectfully direct this Court's attention to the record before it and the appellate court's opinion and request that this Honorable Court recognize the blatant misrepresentations made by VPI.

Petitioner misrepresents to this Court that evidence was not produced by plaintiffs/respondents to prove the applicability of an FSIA exception. (Petition p. 14). This allegation is utterly untrue. Plaintiffs/respondents produced abundant evidence which proved the applicability of FSIA exceptions that the petitioner chose not to rebut. (R. 87-183; 208-13; 216-17; 220; 226; 236-37; 464-68; 486-538; 542-72; 637-40; 674-95; 714-21; 735-38).

Petitioner also misleads the Court when it states that "plaintiffs failed to identify with any specificity the facts upon which their claim against VPI – as opposed to their

claims against the non-foreign sovereign defendants – was based. . . . " (Petition p. 18). Plaintiffs/respondents presented unrebutted evidence which established a direct nexus between VPI's activities and Mr. Brown's horrible injuries. Furthermore, despite VPI's refusal to engage in discovery, plaintiffs produced expert testimony which identified numerous specific design flaws attendant in VPI's paper winder which caused Mr. Brown's injuries. (R. 689-693). VPI's allegations that plaintiffs did not produce evidence to prove the applicability of FSIA exceptions is untrue.

REASONS FOR DENYING THE WRIT

I. There is No Conflict Between the *Brown/Aldy* Decisions and Any Other Courts of Appeal.

There is no conflict between the *Brown* and *Aldy* decisions and decisions of the Courts of Appeal for the Second and Ninth Circuits. VPI misrepresents that the *Brown* decision is in direct conflict with several decisions of the United States Court of Appeals for the Ninth Circuit. *See Joseph v. Office of the Consulate General, supra.* The *Joseph* court, on which petitioners rely, requires the party claiming immunity to rebut the evidence propounded by the plaintiffs/respondents by a preponderance of the evidence. *See Joseph* at 1021. The record reflects abundant evidence presented by plaintiffs/respondents that FSIA exceptions to immunity apply. A reading of the opinions entered by the United States Court of Appeals for the Fifth Circuit and by the district courts reveal that plaintiffs/respondents sustained their

burden by presenting evidence that FSIA exceptions apply and that VPI chose to ignore this substantial evidence.

The *Joseph* case is instructive with regard to the Fifth Circuit's rulings. In *Joseph, supra,* the Ninth Circuit concluded that three (3) exceptions to the FSIA applied: (a) the waiver exception; (b) commercial activities exception; and (c) the tortious activities exceptions. All three (3) of these exceptions are applicable to the current case. Because of the ample evidence that these exceptions to immunity under the FSIA exist in the record before this Court, there is absolutely no conflict between the Fifth and Ninth Circuits with regard to the specificity requirements as petitioner urges. Therefore, this Court should deny the Petition for Writ of Certiorari and sanction petitioners for their vexatious abuse of the United States court system.

Petitioner's allegations that the *Brown/Aldy* decisions conflict with the Second Circuit's decision in *Filus v. Lot Polish Airlines, supra,* is also untrue. First of all, in *Filus,* the Second Circuit reversed the district court's dismissal of plaintiff's lawsuit and ordered the foreign sovereign to participate in discovery. *Filus,* at 1332.

Secondly, with regard to the "failure to warn" claim, the substantial evidence in the record establishes that plaintiffs/respondents' claims are based upon VPI's activities which occurred outside and inside the United States ***and*** which caused a direct effect on the United States. As pointed out by the Fifth Circuit (and implicitly recognized by *Filus,* at 1333), an omission which occurs outside the United States but which causes a direct effect comes within the third clause of 28 U.S.C. § 1605(a)(2).

II. The Record Establishes That Exceptions to the FSIA Exist.

The record before this Court establishes that VPI received fair notice of the activities upon which subject matter jurisdiction of the district court is premised. The plaintiffs/respondents were only made aware of VPI's status as a foreign sovereign when VPI filed its motion to dismiss. Needless to say, VPI never disclosed, while negotiating for the sale and installation of its paper winder at the Moss Point mill, that it did not consider itself to be subject to suit in the United States of America. To the contrary, VPI agreed to indemnify and save harmless IP and its employees for all injuries and damages. (R. 113). Once plaintiffs/respondents were made aware that VPI considered itself to be immune pursuant to the FSIA, plaintiffs/respondents submitted substantial evidence which established that a number of exceptions to sovereign immunity applied in this case. "When a party challenges subject matter jurisdiction, the court is given the authority to resolve factual disputes, along with the discretion to devise a method for making a determination with regard to the jurisdictional issue." *Moran v. Kingdom of Saudi Arabia*, 27 F.2d 169, 172 (5th Cir. 1994). From the pleadings, interrogatories and other discovery, VPI was ably informed of the activities upon which subject matter jurisdiction of the Court is premised and the decisions of the district courts and appellate courts are correct.

III. Case Law Supports the *Brown/Aldy* Decisions.

It is uncontradicted that VPI was engaged in commercial activities which caused Mr. Brown's injuries. The district court made a factual determination that VPI's activities came within the commercial activities exception of 28 U.S.C. § 1605(a)(2). In *Ohntrup v. Fire Arms Center, Inc.*, 516 F.Supp. 1281, 1287 (E.D.Pa. 1991), *aff'd* 760 F.2d 259 (3rd Cir. 1985), plaintiffs filed a lawsuit under theories of warranty, products liability and negligence for injuries sustained when a gun plaintiff was using malfunctioned. A foreign state manufactured and sold the gun in Turkey. The foreign state argued that its activities did not have substantial contact with the United States. The Third Circuit held that the sales agreement indicated that injury in the United States of a purchaser of a defective gun was both a substantial foreseeable consequence of the foreign state's actions. *See Republic of Argentina v. Weltover*, ___ U.S. ___, 112 S.Ct. 2160, 119 L.Ed.2d 394 (1992) ("When a foreign government acts, not as a regulator of a market, but in the manner of a private player within it, the foreign sovereign's actions are commercial within the meaning of the FSIA." 119 L.Ed.2d 394, 405.); *Vermuelen v. Renault USA, Inc.*, 985 F.2d 1534 (11th Cir. 1993) (products liability action against the French manufacturer of an automobile for injuries alleging defective design and manufacture, holding that the foreign state's actions in designing and manufacturing an automobile restraint system come within the commercial activities exception of the FSIA.) Without question, VPI comes within the enumerated exceptions of the FSIA. Its Petition for Writ of Certiorari is frivolous, as has been its prior

motions, and this matter is ripe for disposition at the trial level.

CONCLUSION

The Petition for Writ of Certiorari should be denied.

This the 2nd day of July, 1996.

Respectfully submitted,

PAUL S. MINOR
MARK D. LUMPKIN
MINOR AND ASSOCIATES
P. O. Drawer 1388
Biloxi, MS 39533
601/374-5151

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No. 95-1947

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1996
VALMET OY

Petitioner,

v.

LYNDA ALDY, JANET WALKER,
MARY ANN BUGGS MALONE, MIA MALONE,
KEITH MALONE AND MARCUS MALONE

Respondents.

- and -

VALMET PAPER MACHINERY, INC.

Petitioner,

v.

KENNETH AND ELMIRA BROWN, ET AL.

Respondents.

On Petition for a Writ of Certiorari to
the United States
Court of Appeals for the Fifth Circuit

PETITIONERS' REPLY TO BRIEF IN OPPOSITION

*Michael Evan Jaffe**
David L. Kelleher
ARENT FOX KINTNER
PLOTKIN & KAHN
1050 Connecticut Ave., N.W.
Washington, DC 20036-5339
(202) 857-6000
Counsel for Petitioners

Michael B. Wallace
PHELPS DUNBAR
200 South Lamar
Suite 500
Jackson, MS 39201
(601) 352-2300

**Counsel of Record*

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THE FACT THAT THE *ALDY* AND *BROWN* DECISIONS ARE IN IRRECONCILABLE CONFLICT WITH THE DECISIONS OF OTHER COURTS OF APPEALS IS INDISPUTABLE

Respondents, in their effort to avoid Supreme Court review of the *Aldy* and *Brown* decisions, make the incredible argument that there is no conflict between these decisions and the decisions of other Courts of Appeals. (Respondents' Brief at 6.) The conflicts, however, are direct and irreconcilable.

A. The *Aldy* and *Brown* Decisions Conflict with the Second Circuit's Holding that an Omission is Not an Act Under the FSIA.

In both *Aldy* and *Brown*, the plaintiffs base their jurisdictional claims in part on vague allegations of failure to act, including failure to warn. The Fifth Circuit, in *Aldy*, specifically held that "an omission is an act" within the meaning of the FSIA. (App. 11a.)[1/]

The Second Circuit reached the opposite conclusion in *Filus v. Lot Polish Airlines*, 907 F.2d 1328 (2d Cir. 1990).[2/] The Second Circuit expressly held that "a failure

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1/ In *Brown*, the Fifth Circuit in turn relied on and adopted the *Aldy* decision.

2/ The Second Circuit in *Filus* reversed the District Court but specifically addressed and agreed with the District Court's finding that "it is hard to see how a failure to act can be deemed an act." *In re Air Crash Disaster Near Warsaw, Poland*, 716 F. Supp. 84, 87 (E.D.N.Y. 1989).

to warn does not constitute an 'act...'" under the commercial activity exception of the FSIA.

The result is a conflict between the Fifth Circuit and the Second Circuit on the issue of whether an omission may be deemed an act for purposes of jurisdiction under the FSIA. The conflict between the Fifth Circuit and Second Circuit on this issue is obvious, direct and irreconcilable. Therefore, a Writ of Certiorari is warranted to resolve this conflict.

B. The *Aldy* and *Brown* Decisions Conflict with the Ninth Circuit's Decision Requiring the Plaintiff to Produce Evidence, Not Just Mere Allegations, to Show the Applicability of an Exception to the FSIA.

In *Aldy*, the Fifth Circuit held, as grounds for denying Valmet's summary judgment motion, that mere allegations of negligent design or manufacture "are sufficient enough to confer subject matter jurisdiction" under the FSIA. (App. 10a-11a.) Similarly, in *Brown*, the Fifth Circuit approved pleadings that merely provide the foreign sovereign with "fair notice" of the claims. (App. 17a.) This expansion of Federal court jurisdiction is in direct conflict with the decisions of the Ninth Circuit which require specific evidence of jurisdiction, not mere allegations.

The Ninth Circuit held that the plaintiff must produce evidence, not merely assert allegations, to show the applicability of a specific exception to the FSIA. *See Joseph v. Office of the Consulate General*, 830 F.2d 1018,

1021 (9th Cir. 1987), *cert. denied*, 485 U.S. 905 (1988), (only after the "plaintiff offers *evidence* that an exception to the FSIA applies, [does] the party claiming immunity bear the burden of proving by a preponderance of the evidence that the exception does not apply") (emphasis added). *See also DeBlake v. Republic of Argentina*, 965 F.2d 699, 708 (9th Cir. 1992); *Schoenberg v. Exportadora del Sal, S.A.*, 930 F.2d 777, 779 (9th Cir. 1991). In product liability actions like *Aldy* and *Brown*, this requires evidence of a specific injury-causing defect in a product.

The conflict between the Fifth Circuit and Ninth Circuit is obvious, direct and irreconcilable. Therefore, a Writ of Certiorari is warranted to resolve this conflict.

C. The *Brown* Decision Approving *In Globo* Pleading Conflicts with the Decisions of Several Circuits Requiring Proof of Specific Conduct by the Foreign Sovereign.

In *Brown*, the Fifth Circuit approved generic pleading, which it labelled *in globo* pleading, as sufficient to strip a foreign sovereign of the immunity granted by Congress through the FSIA. (App. 17a n.10.)

Prior to *Brown*, it was well established that unless and until plaintiff presented evidence that there was an identifiable nexus between the specific conduct at issue and the sovereign's commercial activity, jurisdiction under the FSIA would not lie.

The Ninth Circuit requires the plaintiff to establish a causal nexus between the plaintiff's claim and specific

commercial activity by the foreign sovereign. *See Compania Mexicana de Aviacion v. United States District Court*, 859 F.2d 1354, 1360 (9th Cir. 1988); *America West Airlines, Inc. v. GPA Group*, 877 F.2d 793, 796 (9th Cir. 1989). The D.C. Circuit requires the plaintiff to establish that there is a direct causal connection between the specific claim and specific commercial activity of the foreign sovereign. *Zedan v. Kingdom of Saudi Arabia*, 849 F.2d 1511, 1513-14 (D.C. Cir. 1988). The Sixth Circuit requires the plaintiff to establish that its claimed injury was a direct, foreseeable result of specific acts by the foreign sovereign. *Gould, Inc. v. Pechiney Ugine Kuhlmann*, 853 F.2d 445, 452-53 (6th Cir. 1988). The Third Circuit requires the plaintiff to establish a substantive connection between the plaintiff's cause of action and specific commercial activity of the foreign sovereign. *Federal Ins. Co. v. Richara I. Rubin & Co., Inc.*, 12 F.3d 1270, 1288 (3d Cir. 1993).

Thus, each of these circuits requires plaintiffs to establish (1) the specific injury-causing defect and (2) a direct nexus between the injury-causing defect and specific commercial activity of the foreign state. The *Brown* decision eliminates this prerequisite to jurisdiction and accepts in lieu thereof *in globo* allegations of alleged wrongdoing by a collective group of defendants with no proof of a specific injury-causing defect. In light of the numerous conflicts created by the Fifth Circuit's decisions in *Brown* and *Aldy*, petitioners submit that a Writ of Certiorari should be granted to resolve these conflicts.

THE MERE ENGAGEMENT IN COMMERCIAL ACTIVITY DOES NOT CREATE JURISDICTION UNDER THE COMMERCIAL ACTIVITIES EXCEPTION

Respondents also argue that the commercial activity exception must apply in *Brown* because VPI has engaged in commercial activity alleged to be related to the equipment involved in Respondents' accident. This argument -- that mere commercial activity is sufficient to confer jurisdiction -- is contrary to Congress' express mandate in enacting the FSIA and contrary to the plain language of the FSIA. It is well established that merely engaging in commercial activity, either in the United States or abroad, does not create jurisdiction under the FSIA. *America West Airlines, Inc. v. GPA Group*, 877 F.2d 793, 796 (9th Cir. 1989) ("The fact that the Republic of Ireland carries on commercial activities in the United States is, in itself, insufficient to create jurisdiction ..."). Respondents' erroneous argument, however, is a natural consequence of the Fifth Circuit's rulings in *Aldy* and *Brown*, and demonstrates the compelling need for this Court to grant the Petition for Writ of Certiorari to correct the *Aldy* and *Brown* decisions which undo twenty years of FSIA jurisprudence.

The jurisdictional analysis advanced by Respondents and established by *Aldy* and *Brown* fails to give effect to, and indeed omits, Step-One of the jurisdictional analysis mandated by the FSIA. Step-One under the FSIA requires the District Court to identify the specific conduct on which the action is based. *Saudi Arabia v. Nelson*, 507 U.S. 349,

356-57 (1993) ("We begin our analysis by identifying the particular conduct on which the Nelsons' action is 'based'...."); *Arriba Ltd. v. Petroleos Mexicanos*, 962 F.2d 528, 534 (5th Cir.), *cert. denied*, 502 U.S. 956 (1992) (a "necessary prerequisite" to the jurisdictional analysis is a clear understanding of the plaintiff's claim); *Joseph v. Office of the Consulate General*, 830 F.2d 1018, 1023 (9th Cir. 1987), *cert. denied*, 485 U.S. 905 (1988) ("focus only on those *specific* acts that form the basis of the suit").

The specific conduct of the foreign state plays no part in the Fifth Circuit's jurisdictional analysis. In *Brown*, the Fifth Circuit went so far as to authorize District Courts to exercise jurisdiction over foreign states when plaintiffs use *in globo* allegations -- which conceal the specific conduct of the foreign state.[3/]

The substitution of *in globo* allegations in lieu of the specificity mandated by Congress not only eliminates Step-One of the FSIA's jurisdictional analysis, but necessarily eliminates Step-Two as well. Step-Two of the FSIA

[3/] The *Brown* Respondents argue that they satisfied their evidentiary burden under the FSIA by offering numerous examples of commercial activity and expert opinions of equipment defects (also utilizing the *in globo* format). Neither the District Court nor the Fifth Circuit made such evidentiary findings. The District Court relied only on the complaint and conceded that the allegations of the complaint, which attributed all conduct to all defendants without any specificity as to any individual defendant, were "somewhat generic." (App. 50a.) The Fifth Circuit also limited its analysis to the allegations of the complaint and concluded that the *in globo* nature of the allegations did not detract from their specificity (App. 17a n.10), a contradiction in itself.

requires proof of a direct nexus between the specific conduct underlying the claim against the sovereign and the sovereign's commercial activity. See e.g. *Compania Mexicana*, 859 F.2d at 1360; *Zedan*, 849 F.2d at 1513-14. Obviously, if plaintiffs are not required to disclose the specific conduct underlying their claims, no nexus can be established between those unspecified claims and the commercial activity of the foreign state.

THE FSIA MANDATES A SPECIFIC JURISDICTIONAL ANALYSIS FOR CLAIMS AGAINST A FOREIGN STATE

The *Aldy* and *Brown* decisions render 28 U.S.C. § 1605(a)(2) mere words without meaning, as demonstrated by Respondents' and the Fifth Circuit's statements that "VPI has received fair notice of the activities upon which the subject matter jurisdiction ... is premised." (Respondents' Brief at 5; App. 17a.) "Fair notice" of the claims is not at issue. The FSIA concerns itself with the jurisdiction of the Federal courts, not the notice pleading requirements necessary to state a claim in the Federal courts.

Federal courts are courts of limited jurisdiction, and therefore a party that invokes that jurisdiction must clearly establish the jurisdictional basis in order to proceed. *See, e.g., Kokkonen v. Guardian Life Ins. Co.*, 114 S. Ct. 1673, 1675 (1994). Rule 8(a)(1), Fed. R. Civ. P., gives effect to that requirement, providing: "[a] pleading ... shall contain (1) a short and plain statement of the grounds upon which the court's jurisdiction depends ...." Inasmuch as the FSIA is the sole basis for jurisdiction over foreign states,

Argentina Republic v. Amerada Hess Shipping Corp., 488 U.S. 428, 443 (1989), and the commercial activity exception mandates both the particularization of the claim and a direct nexus between the claim and specific activity by the foreign State, the District Court has no jurisdiction over any matter until both of these prerequisites are established. The Fifth Circuit's decision in *Brown* to permit the District Court to assert jurisdiction merely when the foreign state is provided "fair notice" of the claims eviscerates the FSIA and Congress' express limitation on the jurisdiction of the Federal courts.

If the *Aldy* and *Brown* decisions remain uncorrected, then the courts of the Fifth Circuit will stand alone among the circuits in expanding the jurisdiction of the Federal courts over foreign states to any claim involving general commercial activity relating in any way to vague and generalized claims. As a result, Congress' enactment of the FSIA in response to the requests of both the State and Justice Departments for "a uniform statutory explication of the requirements for sovereign immunity," will be defeated in the Fifth Circuit. *Stena Rederi AB v. Comission de Contratos*, 923 F.2d 380, 385 (5th Cir. 1991).[4/]

[4/] Petitioners choose not to respond to the *ad hominem* attacks and charges contained in Respondents' Brief. The compelling need for the Court to grant the Petition for Writ of Certiorari and reaffirm Congress' express purpose of establishing a uniform standard governing the jurisdiction of the Federal courts over foreign states engaged in international commerce is only further demonstrated by Respondents' inability to support the Fifth Circuit rulings in *Aldy* and *Brown* with legal precedent or logical argument, but resort instead to personal attacks on Petitioners and their counsel.

For each of the foregoing reasons, the decisions of the Fifth Circuit in *Aldy* and *Brown* present significant issues that need to be resolved by the Supreme Court and, accordingly, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

Michael Evan Jaffe*
David L. Kelleher
Arent Fox Kintner
Plotkin & Kahn
1050 Connecticut Ave., N.W.
Washington, DC 20036-5339
(202) 857-6000
Counsel for Petitioners

Michael B. Wallace
Phelps Dunbar
200 South Lamar
Suite 500
Jackson, MS 39201
(601) 352-2300

*Counsel of Record